Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
	)	

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EXECUTIVE SUMMARY

AT&T's principal interest in this proceeding is the adoption of unbundling rules that will allow continuation of the facilities-based competition that competitive carriers provide to enterprise customers through self-provisioned switches, fiber rings, and other local facilities. The record is now unmistakably clear that this competition will wither and die if competing carriers cannot obtain cost-based access to "last mile" loop and transport facilities at the limited capacity levels identified in the *Triennial Review Order*. Because enterprise customers have no intermodal alternatives, the Bells will then retain their local monopolies and remonopolize long distance services.

Despite the Bells' attempts at obfuscation, these issues are straightforward matters of law and economics, and the controlling law and the undisputed economic evidence compel adoption of AT&T's proposed rules. The record now before the Commission unambiguously establishes that (1) competitors are subject to severe economic impairment below the capacity thresholds identified in the *Triennial Review Order*; (2) these capacity limits so accurately identify impairment that there is no rational basis to adopt additional exceptions or "triggers;" (3) any attempt to limit competing carriers to special access services would subject them to price squeezes and other foreclosures and would be unadministrable by the Commission; and (4) there is no valid basis to continue so-called "use restrictions." The only way Bells can argue otherwise is by misstating the applicable law, ignoring the undisputed facts, and turning sound economics on its head.

Impairment Below The Capacity Thresholds. The Bells first misstate the Commission's core impairment inquiry. But the governing law has been set forth with unmistakable clarity in the series of judicial decisions that culminated in *United States Telecom Ass'n* v. *FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"). As the court of appeals has twice

held, the Commission must make impairment determinations by asking whether competitive deployment of loop and transport elements is economic or would be "wasteful" in particular general conditions. Specifically, the court of appeals squarely held that impairment determinations turn on the "cost characteristics" of the facilities at issue and on whether they have significant natural monopoly characteristics due to scale economies that create absolute cost differences, sunk costs, or other structural impediments to competitive supply.

The dispositive fact is that there is no dispute about the "cost characteristics" of loop and transport facilities. As the Bells do not and cannot deny, the construction of these telecommunications transmission facilities requires enormous fixed investments – primarily in trenching – and these investments will be "sunk" and unusable for any other purpose once they are made. As a matter of elementary economics, competitive investments to establish alternative loops and transport facilities will thus be uneconomic and "wasteful" – and will not occur – unless the competitive carrier has sufficient committed demand and capacity to allow recovery of the enormous fixed and sunk investments. These economic principles were recognized in *Triennial Review Order* and endorsed in *USTA II*. Their application in the real world is supported by clear evidence from AT&T and numerous other competitive carriers.

Specifically, there is no dispute that the minimum capacity levels identified in the *Triennial Review Order* are necessary in order to make deployment of alternative loops and transport investments even marginally economic. The testimony of AT&T and other competitors shows that they simply will not deploy alternative loops to buildings unless they have more than 2 DS3s of demand – and even then the building must be within a very short distance of a pre-existing splice point on the competitive carrier's backbone for competitive supply to be economic. The testimony similarly shows that competitors will not deploy alternative transport

(*either* dedicated transport *or* entrance facilities) unless they have over 12 DS3s of capacity – and here, too, the facilities that must be short for deployment to be economic. Indeed, the evidence shows that competitive carriers cannot economically construct facilities even when their demand *exceeds* the 2 DS3 and 12 DS3 capacity levels when the distances are longer or when other well-understood and frequently-occurring conditions exist.

And the economic evidence and data regarding actual deployment unequivocally show that competitive carriers cannot economically deploy alternative loop and transport below these thresholds, and that they will not do so in the future. In this regard, the gaps in the *Triennial Review Order* record have been filled in by the factual records developed in the state impairment proceedings, as augmented here with data from state commissions and from competitive carriers. The record now demonstrates that there is *no* appreciable deployment below the thresholds. Indeed, to the extent there has been any deployment below these capacity levels in the past, it has been *de minimis*. The obvious reason for this is that such deployment proved uneconomic and wasteful, as reflected in the bankruptcies of carriers who adopted "build it and they will come" entry strategies. There are only limited cases where deployment below the thresholds may be economic, and these depend on unique circumstances from which no generalizations are possible.

The foregoing facts establish that competitive supply is almost uniformly uneconomic, and thus in the Court of Appeals' words "wasteful," below the 2 DS3 and 12 DS3 capacity thresholds. This is dispositive of the core impairment issue, and impairment must be found for loops and transport below these capacity levels. Notably, a rule that treats these capacity thresholds as establishing the line between impairment and non-impairment is still highly favorable to the incumbents, for there are many conditions in which competitive carriers have

demand above the thresholds on a route but the length of the required facilities or such factors as the absence of rights of way or building access means that competitive supply cannot occur and that there is impairment.

The incumbents do not dispute *any* of these dispositive facts, either in their comments or in the latest iteration of the so-called "UNE Fact Report" written by their lawyers, which cobbles together snippets of (often made-up) statements that are purportedly from news articles, financial reports, and various websites.

Foremost, the incumbents do not even attempt to dispute that deployment below the capacity thresholds is wasteful. Their contrary claims consist primarily of allegations that there have been thousands of miles of fiber transmission facilities deployed. But even if that were true, it is irrelevant, for the incumbents do not identify the capacity levels at which those facilities were deployed, and they make no attempt to show that there has been significant deployment below the thresholds anywhere.

Moreover, the Bells' Report grossly overstates the fiber deployment that has actually occurred. As before, much of what the Bell lawyers rely upon are *intercity* and other *long distance* transmission facilities, which cannot be used to provide local connectivity. Other Bell assertions are simple misrepresentations of the information that appears on competitive carriers' websites and that do not identify the availability of alternative facilities on any specific routes. Still other Bell "facts" defy belief. For example, their list of fiber route miles includes: route miles of the gas lines of a *gas* utility, fiber located in *England*, and the fiber of an *ILEC subsidiary* whose fiber is used in the ILEC's monopoly services. The shoddiness of the "UNE Fact Report" alone precludes giving any weight to its conclusions even if they were relevant.

Further, the Bell Report ultimately underscores that it is uneconomic and wasteful to deploy alternative facilities on the vast majority of the routes where the competitive carrier's demand is less than the capacity thresholds. For despite the Bells' assertions that competitive fiber can readily be deployed, the Bells' own data demonstrate that competitive carriers have not constructed the vast majority of the loops and transport facilities that they use, but have leased these facilities from the incumbents as UNEs or as special access facilities. Indeed, the Bells' data show that competitive carriers use above-cost special access services even to serve customers located on the *same street* as the competitor's fiber backbone – dramatically underscoring that it is uneconomic and wasteful to extend fiber even a short distance when the capacity threshold is not met.

Despite these factors, the Bells have proposed that the Commission make findings of non-impairment for *all* DS3 loops and transport and for *all* DS1 loops and transport between ILEC offices that serve either 5,000, 10,000, or 15,000 business lines. These proposals have utterly no basis in law, economics, or fact. First, the Bells' DS3 proposals are fanciful. They appear to rest on the ground that because competitors may be able to economically deploy loops with *more than* 2 DS3s of capacity, they can deploy *any* DS3 loops and *any* DS3 transport. But the specific cost evidence (to which the Bells do not even refer) clearly shows that the high fixed costs of trenching make it uneconomic to deploy competitive loops of more than a trivial distance unless they will carry more than 2 DS3s of capacity and uneconomic to deploy considerably longer transport facilities unless they will carry more than 12 DS3s of traffic.

And there is no logical basis to tie impairment determinations to simplistic facts such as the total number of business lines in an office. The economics of deploying facilities depends first and foremost on the level of total demand that the competitor will serve on a specific new

facility. Moreover, AT&T has submitted detailed evidence that explains how competitive networks are efficiently designed and the factors that govern the selection of sites for competitive facilities. This and other undisputed record evidence demonstrates that there is an exceedingly weak correlation between the number of business lines in any particular office and the presence of even a single fiber-based collocation in that office. Moreover, the evidence shows that even carriers that have fiber-based collocations in two ILEC offices in a local area typically do not establish physical connections between those offices, meaning that they are not equipped to provide either retail or wholesale service between those points.

In all events, there is no significant correlation between the two factors on which the Bells rely in their proposed test for impairment: the existence of competitive transport on a route between ILEC offices and the presence of the 5,000, 10,000, or 15,000 business lines in the offices on both ends of the route. Indeed, even the Bells concede that there would only be *one* fiber-based collocator in 50% of offices with these many lines. But the relevant fact is not whether there is a fiber-based collocation in a single office, but whether it is economic to deploy alternative facilities on a particular route out of the office. To the extent that there is any significant statistical correlation at all between the size of two offices and the existence of competitive facilities between them, it would not occur unless there were radically more business lines in the offices (say over 70,000). And even this correlation is simply a coincidence, for the number of business lines in two offices is never itself sufficient to justify deployment of transport between them.

The reality is that deployment of alternative facilities is a not function of the number of lines in an individual office, but of the total demand that a competitive carrier will serve on a specific new facility. And the undisputed facts clearly show that impairment exists for all loops

below 2 DS3s and for all transport below 12 DS3s of capacity. *A fortiori*, there is impairment for all DS1s facilities, both loops and transport.

The Absence of Wholesale Alternatives. Competitors will, of course, have alternatives to ILECs on routes where wholesale transmission services are available from multiple providers, and that is why the *Triennial Review Order* provided for exceptions to its unbundling rules on any such routes. However, as AT&T's Comments explained, the evidence clearly demonstrates that there is no reason for such an exception here, and it can dispensed with on administrability grounds.

The records from the state impairment cases show there is a near-total absence of either wholesale loop or wholesale transport provisioning. In 12 states, including California, Texas, Florida, Illinois and Georgia, there were fewer than *50* buildings where two or more wholesalers offered DS3 loops and even fewer buildings offered wholesale DS1 loops. Practically all of those alternatives were in one state (Texas). There were *no* buildings at all meeting these criteria in California, Florida, Illinois, Georgia and nearly all of the other states. The data on wholesale transport options is the same. In 14 states, including all of the above states plus New York and Washington, only two states had *any* routes with two or more wholesale alternatives: New York, where only 0.4% of the 27,000 possible transport routes had wholesale alternatives, and Texas with fewer than 15 total routes.

Further, because of the lock-up provisions of the Bells' special access tariffs and the costs and operational hurdles a competitor would have to overcome to provide services at wholesale, there is now no prospect of any significant additional loop or transport wholesaling in the future.

The Bells' response to the hard evidence is a blizzard of factual misstatements. Their primary contention is that competitors are in fact providing wholesale services on a widespread basis, including assertions that AT&T and an array of other carriers are offering transport at wholesale on all or most routes where they have deployed alternative facilities. These claims are made up out of whole cloth. As the sworn testimony of AT&T and other competitive carriers states, they are not providing wholesale services, and the evidence from the state cases irrefutably demonstrates that there are only a handful of carriers that are doing so, and then only on a trivial number of routes.

Next, the Bells claim that even where competitive carriers are not providing service at wholesale, they readily could do so by purchasing "channelizing" equipment, and creating DS3 (and DS1) circuits that can be sold to other carriers. But as AT&T and other carriers have explained, there are substantial operational, economic, and technological barriers to the provision of wholesale services. The investments required to do so are so significant (channelizing equipment, cross-connect, OSS systems, and monitoring equipment) and the operational requirements of coordinating with the ILECs are so difficult to implement that most carriers generally would not bother to overcome them in the absence of a clear basis to anticipate sufficient demand. And given the "capacity lock-in" terms of the Bells' special access tariffs, there is practically no market demand for competitive wholesale services, because the Bells have locked up virtually all the demand of many competitors. In this regard, *all* the Bells (including SBC) have such lock-in provisions. For example, SBC's tariffs grant "discounts" off the standard monthly access rates (which concededly foreclose competition) only if a carrier commits to purchase 95% of its historic usage from SBC.

For these reasons, unless and until the Commission invalidates the lock-in provisions of the Bells' OPP and other discounted special access tariffs, there will not even be a *possibility* of significant competitive wholesale services, and invalidation of these measures is necessary if the Commission genuinely wants to foster facilities-based competition. But even if such measures were taken, wholesale services will not immediately exist on a widespread basis. Thus, the Commission need not – and should not – establish a wholesale exception to its unbundling rules at this time. Further, if there were to be such an exception, the Commission should rely on wholesaler self-certifications and preclude ILECs from burdening competitors with the kinds of spurious claims that have been advanced here.

Finally, the Commission may not reasonably adopt wholesale or other exceptions to unbundling requirements unless they are coupled with measures that allow competitors to obtain access to UNEs when they remain impaired even when their demand exceeds the capacity thresholds. Specifically, if the Commission were to seek to remedy the *de minimis over*-inclusiveness of unbundling requirements that would result from the absence of a wholesale exception, it would, *a fortiori,* have to address the substantial *under*-inclusiveness that results from the fact that the capacity thresholds significantly *over-predict* non-impairment by denying competitors access to UNEs when the capacity thresholds are met, but when it is uneconomic to deploy alternative facilities, either because of their length or because of the lack of rights of way, building access, and similar necessities.

Special Access. Contrary to the Bells' claims, the existence of special access service provides no basis to deny competitors access to loops and transport as UNEs for landline local and local long distance services. The 1996 Act adopts a cost standard for network element rates for one simple reason: Congress understood that efficient facilities-based competition cannot

thrive if competitors cannot access the ILECs' bottleneck facilities on rates, term and conditions comparable to those the incumbents themselves incur. Otherwise, incumbents can use their enormous economies of scale against competitors by pricing their retail services on the basis of their own economic cost while charging competitors excessive rates to use network elements the competitors cannot duplicate.

There is more than a mere "risk" of such abuse. *USTA II*, 359 F.3d at 576. The comments amply demonstrate that the Bells' special access rates – even their "discounted" rates – are priced far above cost-based levels, as reflected in the TELRIC rates set by the state commissions for the same facilities used to proved special access service. The evidence likewise shows that, for a broad array of business services, the cost of special access represents a substantial percentage of costs of service and is the single largest cost of providing the service. Thus, even if the Bells could not raise special access prices any further, they have the ability and incentive to price squeeze their rivals because of (i) the enormous price differences between special access and UNEs, (ii) the high percentage of costs those facilities represent and (iii) the low profit margins earned by competitive carriers on services sold to sophisticated enterprise customers.

Although not required under *USTA II*, AT&T and other commenters provided detailed evidence demonstrating that the Bells have *already* engaged in price squeezes that foreclose rivals who purchase special access from providing a broad array of local and long distance services. These abuses can only be expected to increase as the Bells gain the capability to provide additional enterprise services. Correlatively, a broad coalition of small and mid-sized competitive carriers provides hard evidence that they currently serve the vast majority of their

customers using UNEs, and that forcing them to serve those customers using special access would render their service unprofitable and likely cause many of them to exit the market.

The Bells again do not dispute any of these facts. Instead, they claim that competition is "flourishing" using special access and that they lack the ability to raise special access prices. Neither claim is true. In fact, the very carriers that the Bells cite as "poster children" for special access are *losing* money. Increasing purchases of special access services from such companies are thus evidence that special access is the disease, not the cure.

Further, as AT&T documented, numerous competitive carriers have been forced into bankruptcy or liquidated outright, and those that remain face significant financial difficulties. Indeed, of the so-called "Big 3," AT&T is the only carrier currently to earn a profit on its business services, and its margin is razor thin. The evidence further shows that these carriers are facing declining revenues as the Bells continue to grow their enterprise businesses.

The Bells' second claim – that they lack the ability to raise special access rates – is ludicrous. The record evidence documents that the Bells have *raised* special access rates where they have obtained pricing flexibility. The Bells' contrary showings are based on metrics that are designed to obscure these price increases by instead reflecting, *inter alia*, price reductions for special access rates that are subject to price caps and shifts in demand between various Bell special access services. Correcting these deficiencies shows that the Bells' special access prices and profits have increased enormously.

The comments also show that the "competitive" special access rates touted by the Bells – which are still well-above economic cost – can only be obtained by carriers that agree to knuckle under to a host of exclusionary terms and conditions. Despite the Bells' semantic summersaults, it is undisputed that the Bells' best rates are available only to carriers that agree to "lock-up"

their traffic for long terms and incur severe shortfall and termination penalties if they do not comply – or even if they attempt to do so and simply face decreased customer demand. Thus, the Bells' special access rates not only give them the ability to price squeeze rivals, but the exclusionary terms they impose on carrier customers also inhibit those carriers' ability to shift demand to self-supply or to third-party alternatives where they could otherwise exist.

Finally, because of the complexities of determining and monitoring whether and when ILECs are engaged in price squeezes, the Commission should accept the Court's invitation and re-adopt a "blanket rule" that treats the existence of special access as irrelevant to impairment determinations, at least for landline services. But if the Commission declines to adopt such a rule, it should hold that special access services cannot eliminate impairment for landline services.

Use Restrictions. The Commission's use restrictions are manifestly anticompetitive and should be eliminated. In their current form, the Commission's "service eligibility" criteria preclude competitive carriers from obtaining cost-based EELs not only for long distance services, but also for many local services. The result is to foreclose competition for these services and preserve the Bells' monopoly rents, because competitors are clearly impaired without cost-based access to those loop-transport combinations.

Ironically – but predictably – the Bells ask the Commission to "fix" the current service eligibility criteria. But the Bells' proposals are a regulation in search of a problem. *USTA II* held that the use restrictions *must* be eliminated unless the Commission finds that competitive carriers' ability to offer long distance service will not be "impaired" if they are denied access to UNEs. 359 F.3d at 592. It is *impossible* to make any such finding now that the Bells have obtained § 271 authority and have begun providing long distance services to enterprise customers nationwide. It is simply not economically feasible for any competitive carrier to

replicate local loops with 2 or fewer DS3s of capacity, or dedicated transport with 12 or fewer DS3s of capacity. This is true whether the competitive carrier would use those facilities to provide only long distance services or all types of retail services.

Moreover, any use restrictions at all are inherently discriminatory. The incumbents have no limits on the services they may provide over their own facilities. If competitors cannot do the same and must incur substantially higher costs than the incumbent, they are inherently disadvantaged. And the disadvantage results in a double hit to competitors. First, they must pay a higher out-of-pocket cost to use high-priced special access rates for some services. At the same time, they must split their demand into multiple pieces, causing their effective costs for "UNEs" use to be inflated as well.

At a minimum, if the Commission decides (unlawfully) to retain these discriminatory restrictions, it must at least modify them in the manner proposed by AT&T to eliminate the "imperfect[ions]" identified by the D.C. Circuit. *See USTA II*, 359 F.3d at 592-93. The existing service eligibility criteria are overbroad and prevent carriers from obtaining cost-based EELs that are used to offer clearly local services. The Bells' proposed rules, in contrast, would only exacerbate the deficiencies inherent in the Commission's existing rules.

Finally, the Commission should permit "conversions" of EELs. Although the D.C. Circuit was concerned that conversions during the term of an existing customer contract would only provide the carrier with "higher profits" while being unnecessary to enable competition, *USTA II*, 359 F.3d at 593, that concern simply does not apply with regard to *renewal* contracts, let alone new contracts. In those cases, there is a substantial risk that an IXC purchasing special access will be unable to win or retain a new or existing customer's business, because it will be unable to match the price that the Bell can offer due to its unfair access cost advantage. This is

particularly true for renewals. In many instances, the Bells recover most, if not all, of their up-front costs of facilities construction in the initial term of the access services they sell to competitive carriers. At the same time, competitive carriers get no rate reduction for the access services they purchase when they renew a special access commitment. Thus, having already recovered a significant percentage of its costs, the Bell has the ability to offer much lower rates than the competitive carrier at the time of the renewal, because the competitor must continue to pay access rates that do not reflect the fact that substantial cost recovery has already occurred.

Entrance Facilities. The Bells do not dispute that entrance facilities are a form of dedicated transport, and they acknowledge that the transport deployment that has occurred (*i.e.,* above the 12 DS3 level) is overwhelmingly for entrance facilities. Thus, there is unquestionable impairment for entrance facilities below that threshold. The Bells' arguments on this subject are simply red herrings. ILECs have facilities serving the buildings in which competitive carriers deploy switches and other network facilities, and it is a simple matter for ILECs to provision entrance facilities. Thus, it is preposterous for Bells to assert that they would have to engage in new construction to provide entrance facilities. And because competitive carriers' switches are centrally located in areas containing many ILEC offices, competitors cannot deploy switches and backbone facilities close to *each* ILEC office in an area, and there are a myriad of circumstances in which the construction of an entrance facility by a competitive carrier would be uneconomic and wasteful.

IDLC Loops. The Commission needs to clarify the ILECs' obligations with respect to both narrowband and broadband in the context of hybrid loops served by integrated digital loop carrier ("IDLC"). In the context of narrowband, the Commission should clarify the extent of an ILEC's obligations when the ILEC lacks the spare copper or universal digital loop carrier

("UDLC") necessary to transfer a customer currently taking voice service (and not DSL service) through such loops. With regard to broadband, the Commission should clarify the ILECs' obligations in the context of a next generation digital loop carrier ("NGDLC") arrangement.

With respect to narrowband, the Commission should require that when a competitive carrier is providing only voice service to a new or existing customer, and the ILEC wishes to provision IDLC, the ILEC must move the competitive carrier's customer to spare copper loop facilities or UDLC. In those circumstances where neither spare copper nor UDLC is available, the ILEC should be required to allow the competitive carrier to continue to provide service to the customer through the UNE platform – which, aside from migration to copper or UDLC, is the only practical means of enabling the competitive carrier to continue to provide voice service.

In addition, because competitive carriers can provide DSL service to customers only through cooper loops, the Commission should require that if an existing customer of a competitive carrier is currently being provided with voice *and* DSL service through a copper loop, and the ILEC wishes to upgrade the customer's facilities to IDLC, the ILEC must either maintain the existing DSL-capable copper loop or move the competitive carrier's customer onto spare DSL-capable copper facilities, whenever a spare is physically available. The Commission should further require that when a customer is currently receiving both voice and DSL service from the ILEC through an NGDLC arrangement, and the retail customer wishes to migrate to a competing carrier, the ILEC should be required to move the competitive carrier's customer onto spare copper facilities (or, where spare copper is not physically available, to provide some other technically feasible method of unbundled access to a transmission path over the customer's loop, including moving the customer to any available fiber to enable the competitive carrier to provide voice and broadband service to the customer).

These clarifications, if adopted, will promote the Commission's goal of facilities-based deployment, because they will give carriers the assurance that they will enjoy the full functionality of the loop after a customer is migrated from IDLC – and, therefore, that they will be able to provide the services their customers demand.

Batch Hot Cut Process. The comments confirm that an effective, efficient batch hot cut process – "a seamless, low-cost process for transferring large volumes of customers" (*Triennial Review Order* ¶ 423) – is an essential component of any transition from the UNE-P to the provision of service through a competitive carrier's own facilities. Unless an adequate and cost-effective batch hot cut process is in place, competitive carriers using self-deployed switches (or leased capacity on third-party switches) will face precisely the same operational and economic barriers to competitive entry that the *Triennial Review Order* found in the context of individual hot cuts.

The ILECs have not established effective batch hot cut processes. Although they claim to have developed such processes, they have not been adequately tested to determine whether they even work as promised, much less whether they constitute a "seamless, low-cost process." And the available evidence makes clear that these processes do not live up to the ILECs' claims. Moreover, ILECs' batch hot cuts are often priced well in excess of TELRIC levels, making transitions to competitive facilities uneconomic.

Other Issues Raised In Pending Proceedings. AT&T's reply comments also address issues raised by commenters concerning a number of other Commission proceedings. First, AT&T shows that the 1996 Act includes multiple express reservations of state commission authority to impose additional pro-competitive requirements under state law that go beyond minimum federal requirements. Second, AT&T shows that state commissions, and not the

Commission, are entrusted in the first instance with setting the prices and terms for § 271 checklist items. Third, AT&T shows that the Bells cannot lawfully rip apart already combined § 271 network elements.

Transition Rules. Finally, the Commission should rely on its express authority under § 251(d)(2) and its inherent authority to issue reasonable transition rules that will not cause significant marketplace and customer disruption. Carriers have made considerable investments and formed business plans in reliance on the Commission's rules. Flash-cut elimination of UNEs would strand that investment and lead to potentially massive service interruptions. The Commission should thus adopt transition rules that grandfather existing contracts for at least their initial term and that otherwise phase out any "de-listed" UNEs over a two-year period.

Contrary to the Bells' claims, the Commission has ample authority to adopt such rules, both under its inherent authority and § 251(d)'s "at a minimum" clause. Nor should the Commission effectively eliminate a transition period by adopting the Bells' proposed "change of law" rules. Negating existing change of law provisions would not only be bad policy, it is also unlawful.

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TABLE OF FCC ORDERS CITED IN COMMENTS AND REPLY COMMENTS

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New York 271 Order	Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295*, 15 FCC Rcd. 3953 (1999)

Nevada 271 Order	Memorandum Opinion and Order, *Nevada Bell Telephone Company, and Southwestern Bell Communications Services, Inc., for Authorization to Provide In-Region, InterLATA Services in Nevada*, 18 FCC Rcd 7196 (2003)
Non-Accounting Safeguards Order	First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 271 of the Communications Act of 19343 As Amended*, 11 FCC Rcd. 21905 (1996)
OI&M Order	Report and Order, *In the Matters of Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates*, 19 FCC Rcd. 5102 (2004)
Pricing Flexibility Order	Fifth Report And Order And Further Notice Of Proposed Rulemaking, *Access Charge Reform, Price Cap Performance Review For Local Exchange Carriers,* 14 FCC Rcd. 14221 (1999)
SBC-Ameritech Merger Order	Memorandum Opinion And Order, *Applications Of Ameritech Corp., Transferor, And SBC Communications Inc., Transferee, For Consent To Transfer Control Of Corporations Holding Commission Licenses And Lines Pursuant To Sections 214 And 310(d) Of The Communications Act And Parts 5, 22, 24, 25, 63, 90, 95 and 101 Of The Commissions' Rules,* 14 FCC Rcd. 14712 (1999)
SBC-Ameritech Merger Conditions Order	Memorandum Opinion and Order, *Applications of Ameritech Corp., Transferor, & SBC Communications, Inc., Transferee,* 17 FCC Rcd. 19595 (2002)
SBC Shared Transport NAL	Forfeiture Order, *SBC Communications, Inc. – Apparent Liability for Forfeiture*, 17 FCC Rcd. 19923 (2002).
Section 257 Report	Report, *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Business*, 12 FCC Rcd. 16802 (1997)
Tariff 12 Order	Order on Remand, *AT&T Communications, Revisions to Tariff F.C.C. No. 12*, 6 FCC Rcd. 7039 (1991)
Tariff 15 Order	Memorandum Opinion and Order, *AT&T Communications, Tariff F.C.C. No. 15*, 6 FCC Rcd. 5648 (1991)

Texas 271 Order	Memorandum Opinion And Order, *Application By SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, Pursuant To Section 271 Of The Telecommunications Act Of 1996 To Provide In-Region, InterLATA Services In Texas,* 15 FCC Rcd. 18354 (2000)
Third Transport Rate Order	Third Memorandum Opinion and Order on Reconsideration, *Transport, Rate Structure and Pricing*, 10 FCC Rcd. 3030 (1994)
Triennial Review Order	Report and Order on Remand and Further Notice of Proposed Rulemaking, *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (2004), *as corrected by Errata*, 18 FCC Rcd. 12020 (2004)
UNE Remand Order	Third Report And Order And Further Notice Of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd. 3696 (1999)
US West LATA Order	Memorandum Opinion and Order, *Application for Review and Petition For Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd. 14401 (1999)
Virginia Arbitration Order	Memorandum Opinion and Order, *Petition of AT&T Communications of Virginia, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Virginia Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc.*, 19 FCC Rcd. 1259 (2004)
Volume Discount Order	Report and Order, *Private Line Rate Structure and Volume Discount Practices*, 97 F.C.C. 2d 923 (1984)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
	)	

REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's *Notice*, AT&T Corp. ("AT&T") respectfully submits its reply comments concerning the availability of unbundled network elements under §§ 251(c)(3), 251(d)(2), and 271(c)(2)(B) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §§ 251(c)(3), 251(d)(2), 271(c)(2)(B).

ARGUMENT

I. THE BELLS BADLY MISREPRESENT *USTA II* AND THE COMMISSION'S IMPAIRMENT INQUIRY IN MULTIPLE RESPECTS.

As AT&T's opening comments demonstrated (at 7-13), *United States Telecom Ass'n* v. *FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") endorsed the fundamental criteria that the *Triennial Review Order* adopted for making impairment determinations for high capacity loops, dedicated transport, and related transmission facilities. The Court squarely endorsed a standard that asks whether there are entry barriers to "competitive supply" of alternative facilities by efficient competitive carriers because of their natural monopoly characteristics or structural impediments to competitive supply, such as sunk costs, absolute cost advantages enjoyed by incumbent local exchange carriers ("ILECs" or "incumbents"), first-mover advantages, and

operational barriers to entry that are within the sole or primary control of the ILEC. *USTA II*, 359 F.3d at 571-72. The Court further acknowledged that it appeared "[]feasible" to assess whether there are such barriers to entry only by reference to the characteristics of individual point-to-point routes, *id.* at 575, and the Court did not question the Commission's determination that the capacity needs of the competitive carrier on a route is the primary determinant of whether competitive supply would be economic or would be wasteful, *id.*

In this regard, the Court did not question the national impairment findings for all DS1 loops and for all DS3 loops with less than 2 DS3s of capacity. Similarly, while the Court vacated the Commission's impairment findings for dedicated transport on routes where a competitive carrier has less than 12 DS3s of capacity, the Court did so on only very narrow grounds. It primarily relied on the ground that the *Triennial Review Order* had *disclaimed* that the Commission had an evidentiary basis for making a non-provisional national impairment finding, because the Commission stated that it did not have sufficient evidence to determine whether and to what extent transport had been or could be economically supplied at lower capacity levels in local markets throughout the country. *Id.* at 573. The Court also stated that the Commission had violated the Administrative Procedure Act ("APA") by not expressly explaining why it rejected the Bells' proposal to treat MSAs as the relevant market and by purportedly treating evidence of deployment on one route as irrelevant to impairment determinations on similarly situated routes. *Id.* at 574-75. Finally, the Court stated that the Commission was obligated to consider further whether it would treat ILEC special access services as relevant to unbundling determinations for currently competitive markets (wireless and long distance) or whether it would decline to do so because of (i) the risks of ILEC abuse,

(ii) different "opportunities and risks" presented by unbundled network elements ("UNEs") and special access and/or (iii) administrability issues. *Id.* at 576-77.

AT&T's opening comments and those of other competitive providers and state commissions show that all of these questions are readily answered and that the Commission is fully authorized to re-adopt national impairment findings for DS1 level loops and transport and DS3 loops up to 2 DS3s per location and DS3 transport up to 12 DS3s per route. Indeed, the record shows that these capacity limits – standing alone – are near perfect predictors of competitive impairment. In fact, the record also shows that the capacity limits are much more favorable to the ILECs than to competitive carriers, because they prevent access to loops, transport, and loop-transport combinations ("EELs") in many circumstances where competitors are still impaired. In contrast, the Bells' proposals to further limit access to essential loop and transport UNEs would yield highly erroneous results that would severely injure – if not completely eliminate – competition in enterprise markets.

In particular, AT&T's opening comments demonstrate in detail (at 30-80) that the factual records compiled in the state impairment proceedings and enriched here by both competitive carriers and data from state commissions fill in each of the evidentiary and other gaps that had been noted in *USTA II*. This record thus requires the adoption of rules that allow UNE access to all DS1 facilities and loops up to 2 DS3s and to transport up to 12 DS3s for all landline services – with (at most) exceptions on routes with sufficient wholesale alternatives. The opening comments further demonstrate that the very grounds set forth in *USTA II* require that the Commission either treat the availability of special access as irrelevant to impairment determinations for landline services or find that special access services cannot prospectively

eliminate the impairment that results from the economic barriers to competitive supply of loops and transport at or below the capacity thresholds.

For these reasons, it unsurprising that the Bells' comments are primarily devoted to a series of extreme and untenable legal claims. They contend that the court of appeals' decisions in *United States Telecom Ass'n* v. *FCC*, 290 F.3d 415 (D.C. Cir. 2001) ("*USTA I*") and *USTA II* preclude the Commission from making national impairment findings and from ordering access to loops and transport below the capacity thresholds for all, or for some, landline local and long distance services. Their specific contentions range from attempts to erect insuperable procedural obstacles to the Commission's adoption of national rules to a series of claims that *USTA I* or *USTA II* prohibits findings of impairment for specific categories of services. There is no substance to any of these claims.

National Impairment Findings Are Permissible. The Bells first suggest that the Commission cannot make national impairment findings, but can only make market-by-market determinations. *E.g.*, Qwest at 14; Verizon at 7-8. They then assert that the Commission cannot adopt rules that order unbundling in any geographic market or market segments unless the Commission specifically finds impairment in *that* particular market.

This is nonsense. *USTA I* and *USTA II* both recognized that national impairment findings are valid if they are based on sources of impairment that are "widespread," that do not vary substantially from locale-to-locale, or that otherwise exist generically. *USTA II,* 359 F.3d at 569; *USTA I,* 290 F.3d at 425-26. These decisions require only that the Commission adopt rules that reasonably distinguish between the general conditions in which competitive supply is economic and those in which it is not economic and is thus, in the language of *USTA I*, "wasteful." Indeed, in their argument before the court of appeals in *USTA II,* the Bells disclaimed any claim that the

Commission must make market-by-market determinations. They acknowledged that all the Act could or did to require was that the Commission to determine the general conditions in which competitive supply is and is not economic, by examining the deployment that had occurred and then extrapolating from that evidence to make generic findings. Brief for ILEC Petitioners and Supporting Intervenors, at 33 (filed in D.C. Cir. No. 00-1012, Jan. 16, 2004).

In this regard, the Court expressly recognized that general Commission rules will inevitably contain "some" over-inclusiveness – *i.e.,* elimination of unbundling on routes locales where impairment exists – as well as some under-inclusiveness – *i.e.*, requirements of unbundling on routes where there is no impairment. *USTA II,* 359 F.3d at 570. Moreover, the Court also expressly acknowledged that the Commission can rely on issues of administrability in fashioning unbundling rules. *USTA I*, 290 F.3d at 425; *USTA II*, 359 F.3d at 575-76. Hence, the Bells' claim that the Commission must separately address conditions in *each* market in the country before it can order unbundling *anywhere* is absurd.

In *USTA I,* the Court vacated the Commission's national impairment finding for all transport at all capacity levels because, although the Commission had acknowledged that there was extensive deployment of alternative transport, its rules made no attempt to distinguish between routes where competitive supply was and was not economic. Similarly, in *USTA II,* the Court did not vacate the *Triennial Review Order*'s national finding for transport on the ground that the Commission had failed to examine conditions in every local market. Rather, the Court's decision was based on the fact that the *Triennial Review Order* had essentially disclaimed that the Commission had a factual basis for finding that competitive carriers would generally be impaired if they cannot obtain access to up to 12 DS3s of dedicated transport. In the order, the Commission had stated that it had insufficient evidence to determine whether there might be

substantial deployment below those thresholds in some markets or whether it would be economic to deploy transport below these thresholds in particular markets. In the Court's view, this was tantamount to an admission that the Commission "doubt[ed]" it had an evidentiary basis to support a general national impairment finding. *USTA II*, 359 F.3d at 574.

This evidentiary gap has now been completely filled, both by detailed evidence collected in state proceedings around the country and additional facts provided in the comments. In particular, the record here contains detailed microeconomic evidence that it is simply not economic to deploy transport if a competitive carrier has less than 12 DS3s of demand on the route, and it also shows that it is not economic to deploy loops if a competitive carrier requires less than 2 DS3s to serve a building. *See infra* Part II.A; AT&T at 27. The record also shows that virtually all the competitive loop or transport deployment that has occurred is *above* these thresholds. *See infra* Part II.A; AT&T at 52. To the limited extent DS1 and DS3-based services are provided using self-provided facilities, the evidence shows that it is because (i) the carrier justified the facilities based on other, larger telecommunications needs of the customer (*e.g.*, high speed LAN connectivity); (ii) the carrier provided its facilities on an irrational "build it and they will come" basis without a requirement that it have committed demand before engaging in the construction; (iii) some of the initial demand that justified the initial construction was disconnected upon expiration of the contract; or (iv) unique conditions existed (*e.g.*, the need for only extremely short outside plant construction) from which no generalizations can be made.

The Existence Of Alternative Facilities On One Route Is Not *Dispositive* Of Anything. The Bells also argue that the existence of alternative facilities on one route is "dispositive" of the lack of impairment in that market and in all similarly situated markets.

BellSouth at 10; Verizon at 22; SBC at 12; Qwest at 78-80. This is a flat misrepresentation of *USTA II.*

USTA II upheld the *Triennial Review Order*'s finding that the existence of competitive supply on one route "should not be *sufficient* to establish competition is possible" on any second route. 359 F.3d at 575. All the Court held is that the Commission cannot "ignore facilities deployment along similar routes" and "to treat competition on one route as *irrelevant* to the existence of competition on the other[s]." *Id.* (emphasis added). Under *USTA II,* the fact that facilities have been deployed on a route cannot be "dispositive" of anything.

The simple reality is that telecommunications transmission facilities are often deployed in conditions where the deployment turns out to have been uneconomic. That initially occurred on a large scale in the late 19th and early 20th centuries, when multiple firms deployed alternative local exchange facilities, provided "competing" services for a while, and later went bankrupt – providing vivid proof that all of local telephony was then a natural monopoly. Similarly, there are numerous instances in the recent past where competitive carriers deployed transmission facilities on particular routes because they were operating on a misguided "build it and they will come" basis, because they were otherwise counting on uncommitted demand that never materialized, or because they misapprehended the costs and basic economics of telecommunications transmission facilities. While the existence of these facilities may not be *irrelevant* to impairment determinations, any rational assessment of this "relevant" evidence leads directly to the conclusion that *other* competitive carriers cannot *economically* deploy alternative facilities on either the same or different routes *unless* they face both similar *committed demand* and comparable economic and operational circumstances.

Here, the fundamental reality is that the evidence of actual marketplace deployment has one single general teaching. It can be economic to deploy alternative loops when there is demand for over 2 DS3s of capacity, where the competitive carrier has obtained preliminary prerequisites such as rights of way and building access and where the building is very close to a pre-designed access point on a competitive carrier's already deployed fiber. AT&T, Fea-Giovannucci Dec. ¶ 36. It can also be economic to deploy alternative transport when there is demand for over 12 DS3s of capacity, where the competitive carrier has obtained the necessary rights of way and only needs to construct a relatively short fiber extension to its network. *Id.* ¶ 35. But in *all other conditions*, alternative deployment is generally both uneconomic and wasteful. That has been the experience of AT&T and other carriers when they deployed alternative facilities in these other conditions, and no efficient carrier today would deploy alternative facilities below the capacity thresholds.

Thus, the Commission clearly should treat all the competitive deployment that has occurred as "relevant" to its impairment determinations. Based on this evidence, it can comfortably adopt rules that restrict access to UNEs to locations and routes that meet the capacity thresholds, based on the evidence from the other routes that show that competitive deployment is uneconomic in these conditions. Indeed, there is *no* record evidence that it would be generally economic for any competitor to construct new facilities at or below those limits. On the other hand, the evidence shows that it is often uneconomic for competitive carriers to build facilities even when they have demand above the thresholds. Thus, the capacity levels adopted in the *Triennial Review Order* are themselves a very conservative measure of establishing the line between competitive impairment and non-impairment.

The Relevance Of Special Access. The Bells' misstatements reach their zenith when they discuss the relevance of special access services to impairment determinations. They treat *USTA II* as categorically requiring the Commission to assess whether the availability of special access eliminates impairments that otherwise would exist and as categorically prohibiting the Commission from granting UNE access for providers of any services that are currently "competitive." BellSouth at 37; Verizon at 19-21. But they can make these totally erroneous claims only by ignoring *USTA II*'s actual holdings and by quoting snippets of the opinion out of context.

Special access is not even mentioned in the portion of *USTA II* that addresses UNE rights for providers of landline local exchange and exchange access services. Rather, the Court addressed this issue in vacating the rules that granted UNE rights to CMRS providers, who indisputably had successfully provided wireless services in competition with ILECs for 20 years by using special access to obtain incidental transport that is used in wireless systems (which represents less than 2% of wireless carriers' overall service costs). *USTA II*, 359 F.3d at 575-77. The Commission had justified granting UNE rights to wireless carriers solely on the basis of its decision to treat the availability of special access as irrelevant to unbundling determinations – because the Commission viewed the existence of above-cost special access rates as inconsistent with the Act's requirement that UNEs be available at cost-based rates. *USTA II* vacated that rule because it found this justification was circular and failed to provide sufficient grounds to require that UNEs be made available to CMRS providers. *Id.*

Contrary to the Bells' claims (BellSouth at 37; Verizon at 19), *USTA II* did *not* hold that the Commission must consider above-cost special access services in making impairment determinations for wireless services, much less for landline services. Although the Bells

studiously refuse to acknowledge it, *USTA II* expressly *invited* the Commission to re-adopt on remand the rule that treats special access as irrelevant to unbundling determinations. *USTA II* explicitly held that the Commission could find that relegating competitive carriers to above-cost special access services creates risks of ILEC abuses that justify findings of impairment, regardless of whether current provision of services through the use of special access might be profitable. 359 F.3d at 576-77. *A fortiori,* the Commission cannot relegate competitive carriers to special access where – as here – there is direct evidence that the Bells are *currently* price squeezing carriers that would use special access to foreclose competition for a number of services. *See infra* Part III.A.1.

In this regard, *USTA II* recognized that there is an obvious "risk of ILEC abuses" if competitive carriers are limited to tariffed special access services (359 F.3d at 577), specifically citing the "ILECs' incentive[s]" to set the special access prices "as high as possible" relative to their retail rates. *USTA II,* 359 F.3d at 576. The Court also recognized that "the vagaries of determining when th[ose] price[s] get[] so high that the 'impairment threshold' has been crossed" are formidable, that attempts by the Commission to assess the present and future competitive significance of special access could raise "real administrab[ility] issues," and that "these complications" themselves could "*support a blanket rule treating the availability of ILEC tariffed services as irrelevant to impairment*." *Id.* (emphasis added) Further, the Court recognized that tariffed special services "present different opportunities and risks for the requesting carrier than the use of UNEs" and that the Commission may find that these differences will create impairment if competitive carriers are limited to special access for their landline or other services. *Id.* at 577. As explained in detail in AT&T's and other competitors'

opening comments and below in Part III, these considerations require a rule that grants providers of landline services access to loops and transport below at or below the capacity thresholds.

Notably, the Bells themselves acknowledge that the existence of special access is not, strictly speaking, part of the impairment inquiry at all under *USTA I* and *USTA II*. As the Bells correctly state, the focus of the impairment inquiry is on whether competitive supply of alternative facilities would be uneconomic and hence "wasteful." Qwest at 15-16; SBC at 5; Verizon at 28. *USTA I* and *USTA II*, however, both hold that the answer to this question turns on the "cost" characteristics of the facilities and whether competitive supply is unlikely because the facilities have "some degree" of natural monopoly characteristics. *USTA I,* 290 F.3d at 427; *USTA II*, 359 F.3d at 562. The focus must therefore be on the microeconomic and market facts that identify whether and when it would be economic for competitive carriers to attempt to overcome the ILECs' first mover and other advantages and to make huge sunk investments in facilities that are characterized by enormous economies of scale.[1] Because competitive carriers incur huge transactional and other costs in leasing UNEs or other facilities from ILECs and because competitive carriers receive substantial other benefits when they supply facilities themselves, they actively seek opportunities to supply loops and transport when it is economic to do so, *i.e.*, when they have sufficient demand to achieve unit costs that are close to the

[1] In this regard, it is curious that Qwest (alone among the Bells) contends that unbundling obligations cannot apply to facilities that ILECs deployed after the 1996 Act eliminated the ILECs' *de jure* monopolies. *See* Qwest at 19-20. Qwest's argument appears to be based on the notion that a decision to eliminate these entry barriers deprived "new" Qwest's facilities of their natural monopoly characteristics. Qwest is confused. When Qwest deployed fiber along its existing routes in the aftermath of the 1996 Act, it was taking advantage of its entrenched monopoly that allowed Qwest to spread the enormous fixed investments in facilities over its entire customer base. It is this fact that created barriers to competitive deployment of alternative loop and transport facilities, even where a Qwest upgraded or replaced transmission media or electronics after the effective date of the Act.

incumbents' and when they are satisfied that they will be able to offer rates that are competitive with the rates the ILECs will charge in *response* to their entry. AT&T at 8-9. But under the conditions that generally exist throughout the country, competitive carriers simply cannot afford to supply alternatives below the *Triennial Review Order*'s capacity thresholds for loops and transport, because doing so would be uneconomic and wasteful.

The Bells' claim here is that, despite the natural monopoly characteristics of these facilities that create impairment, competitive carriers should not receive access to the facilities as UNEs on the theory that "competitors" do not "need the price break that comes with UNE pricing." Verizon at 20. The Bells base this claim solely on the ground that competitive carriers were purportedly able to offer some competitive services in the past when the Bells were *barred* from the long distance market and when the competitive carriers were uniformly limited to above-cost special access services because of the Commission's use restrictions on UNEs and other Bell intransigence in making UNEs available.

But as detailed below in Part III, the Commission should reject these claims out of hand. The Act makes UNEs available at cost-based rates when there is impairment *precisely because* such pricing alone provides at least some protection against ILEC price squeezes and other actions that foreclose competition. While the Commission could justify exceptions in uniquely structured markets where the ILECs have no practical ability and the incentive to change wholesale or retail rates to effect these foreclosures – *e.g.*, wireless services – all landline services face an inherent and uncontrollable risk of such squeezes if competitors are denied cost-based access to the Bells' natural monopoly facilities. The Court itself recognized that there are inherent risks of ILEC abuses, and when the ILECs act on their incentives to foreclose competition, the effect will be to strand competitive fiber rings and switches, assure that further

facilities investment will not occur, and defeat the Act's objectives by preventing local and ending long distance competition. Beyond that, particularly because the Commission's special access regulations do not prevent price squeezes, the Commission would assume insuperable administrative burdens if it even attempted to make these assessments. Thus, the Commission should accept the Court's invitation to re-adopt its former rule that treats special access as irrelevant to unbundling determinations, especially for landline services.

The Relevance Of Competition In Today's Market. But the Bells take matters a step further and argue that unbundling *cannot* be ordered if a market is currently competitive. BellSouth at 12; Qwest at 2; SBC at 12; Verizon at 22. They make this claim principally to justify their view that long distance services should continue to be ineligible for UNEs.

The Bells are assuredly correct that if existing levels of intermodal competition are sufficient to achieve the objectives of the Act, then *USTA I* and *USTA II* prohibit granting UNE access to providers of these services. But there is *no* such intermodal competition in the provision of landline services to enterprise customers. *See infra* Part II. Nor can it have the slightest relevance that long distance services for enterprise customers were competitive during the prior regime in which Bells were excluded and in which all IXCs obtained essential high capacity loops and transport under special access tariffs. The Commission's unbundling determinations are *forward-looking*, thus the focus cannot be on whether a market is competitive *today*, but on whether it will be competitive tomorrow and in the long run if competing carriers are denied access to UNEs and limited to special access. And the evidence is that competition will surely be restricted if competitive long distance carriers are denied access to UNEs at the low levels encompassed by the capacity limits.

The evidence shows that the ILECs have already used above-cost special access rates to foreclose competition in local frame relay and other enterprise service markets, and they can extend their local monopolies into long distance unless long distance carriers can obtain loops and transport facilities as UNEs below the capacity thresholds. AT&T and other carriers have already shown that special access price squeezes are becoming increasingly common in enterprise services markets. *See infra* Part II; AT&T at 123-34. And numerous other competitive carriers report that they will simply have to contract, and more likely fold, if they are forced only to rely on special access. *See infra* Part III.A.1 (summarizing comments).

The Bells' contrary arguments rest solely on an out-of-context quotation from *USTA II.* They cite a statement the Court made in explaining why it was vacating the *Triennial Review Order* insofar as it permitted "'conversions' of wholesale special access purchases to UNEs." *USTA II,* 359 F.3d at 593. In *that* context, the Court stated that "the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access . . . precludes a finding that the CLECs are 'impaired' by lack of access to the element under § 251(c)(3)." *Id.* At the same time, however, the Court explicitly held that the presence of any current competition did not require a finding of nonimpairment for the *future* competition that would exist between ILECs and competitive carriers (*e.g.*, for new and renewal long distance contracts). The Court stated only that "if history showed that lack of access to EELs had not impaired CLECs in the past, that would be *evidence* similarly situated firms would be equally unimpaired *going forward.*" *Id.* (emphasis added). Here, of course, this "evidence" of nonimpairment is totally rebutted by the fact that competitive carriers were not competing "in the past" with Bells in long distance markets when they were denied access to EELs. And now that

the Bells have been granted authority to compete in these markets, the Bells' will certainly price squeezes their rivals if access to EELs is denied.

The Impairment Standard. Finally, the Bells acknowledge, as they must, that the *Triennial Review Order*'s basic impairment standard is sound and was approved by *USTA II.* SBC at 10; Verizon at 15, 17. As they note, the Court required only that the Commission clarify whether barriers to entry would likely make deployment of alternative facilities uneconomic and wasteful by *efficient* competitive carriers using the most efficient available technologies. AT&T and the Bells all agree that the *Triennial Review Order* had contained this very requirement and that, in all events, the Commission should make explicit its focus on efficient carriers. *Compare* AT&T at 10-11 *with* Verizon at 22.

The Bells also make a number of arguments that are designed impermissibly to narrow the conditions in which impairment can be found and national unbundling ordered. Many of them have no pertinence to the high capacity loop and transport facilities used to serve enterprise business customers, and these claims thus underscore the importance of *assuring* the availability of UNEs to serve enterprise customers whenever impairment appears likely if UNE access is denied. Although the availability of intermodal alternatives potentially lessened the adverse consequences of the Commission's decision to deny access to narrowband facilities or to the broadband capability of loops (*see* SBC at 27; Verizon at 18), there are generally *no* intermodal alternatives available to enterprise customers. *See* Selwyn Reply Dec. ¶ 89. Thus, if the Commission were to eliminate UNEs where impairment exists, these enterprise customers will have *no* competitive alternatives.

The Bells similarly argue that UNE access must be denied if it is "possible" that "actual" competition will be provided by a single provider if UNE access is denied. SBC at 60; Verizon

at 12-14. This, too, appears to be an argument directed at mass market services and to be a claim that the presence of a single cable competitor is enough to achieve the goals of the Act. But even in this context, the Court acknowledged that the presence of a single cable competitor was merely a mitigating factor that helped justify the Commission's decision to deny access to the broadband capabilities of loops in conditions where there was acknowledged impairment to competitive carriers, but where the goals of § 706 of the Act were furthered by denying access. *USTA II,* 359 F3d at 579-80. These holdings have no conceivable applicability to high capacity loops and transport facilities that are used to serve enterprise customers, that cannot be offered by intermodal competitors, and that do not implicate the goals of § 706 of the Act.

In all events, the Commission has correctly held that the benefits of the Act *cannot* be achieved by a duopoly. *Triennial Review Order* ¶¶ 245; *UNE Remand Order* ¶ 345. The question before the Commission is thus whether supply of alternative facilities by *multiple* competitive carriers will be "wasteful." *USTA I,* 290 F.3d at 427. As detailed below, waste – and seriously limited competition – will certainly occur unless competing carriers can have unfettered UNE access to high capacity loops, transport, and EELs below the *Triennial Review Order*'s capacity thresholds.

Relevant Geographic Markets. In *USTA II,* the Court of Appeals acknowledged the factors that supported the Commission's longstanding (and the ILECs' previous) view that the (i) relevant geographic market for making impairment determinations for loops and transport are point-to-point routes and (ii) primary determinant of whether a competitive carrier can overcome the barriers to the deployment of alternative facilities is its level of committed demand for capacity on a route. In particular, the Court noted the seeming "infeasib[ility]" of using MSAs or the Bells' proposed alternative market definitions, stating that "it may be infeasible to define the

barriers to entry in a manageable form [that] may usefully be applied to MSAs." *USTA II,* 359 F.3d at 575. Nonetheless, the court concluded that the Administrative Procedure Act ("APA") compelled a remand on the hyper-technical ground that the "Commission nowhere suggested that it explored such alternatives, much less found them defective." *Id.*

Given the Court's statements, all the Bells – save Verizon – have abandoned any claim that the Commission should adopt MSAs as the relevant market. Indeed, the Bells' own economists have for years consistently acknowledged that the markets for high capacity services are point-to-point. AT&T at 16. The only way that Verizon can persist in arguing otherwise is by ignoring the Court's statements and blinding itself to the facts.

The impairment inquiry focuses on whether barriers to entry – scale economies, sunk costs, first mover advantages, absolute cost advantages, and other structural impediments – make deployment of alternative transmission facilities uneconomic and/or wasteful. The simple reality is that these barriers to entry for high capacity transmission facilities can *only* be applied to individual routes. Carriers will deploy transmission facilities on an individual route only if they have a sufficient demand on that route to justify the enormous fixed and sunk investment that deployment entails *and* have acquired the necessary rights of way and overcome any other barriers to deployment specific to that route. And to the extent wholesale alternatives are relevant, they also either exist or are absent on specific routes. As AT&T has explained (at 15-20), it is a simple matter to extrapolate from these facts to make national findings of impairment or non-impairment that are based on the conditions a competitor faces on a route and to adopt self-executing rules. And critically, it is clear that the use of an MSA (or any other large geographic area) as the relevant market for analysis would have radically higher "error costs" –

in terms of false positives and false negatives – than would a market definition that is based on point-to-point routes.

Verizon does not dispute that the barriers to entry in constructing alternative facilities exist at the route level. Nevertheless, it attempts to justify the use of MSAs on other grounds that are irrelevant and erroneous. *See* Verizon at 24-27.

Verizon's primary claim appears to be that competitors *offer service* in more places than on the particular routes where they have constructed facilities. Verizon here relies on the ground that competitors have *leased* ILEC facilities (through UNEs or special access tariffs) to connect customers to their fiber backbones or to their centrally deployed switches and that competitors thereby offer service to customers located in segments of MSAs or other "broad[er] geographic markets." *Id.* at 25 Verizon's argument misses the point completely. The areas where competitors offer service through UNEs or special access facilities obtained from the ILECs have no possible relevance to the geographic market for an impairment determination. As Verizon correctly states elsewhere (at 12), the impairment determination focuses – as it must – on whether and where there are barriers to entry that make alternative facilities not "suitable for competitive supply." Such an inquiry can only focus on the specific geographic areas where those entry barriers apply – individual point-to-point routes – as the Court recognized.

Verizon also contends that the adoption of MSAs as the relevant market will reduce the Commission's administrative burdens. Verizon bases this claim on the assertion – refuted above – that the Commission would otherwise be required to make specific route-by-route determinations for each point-to-point route in the country. That is nonsense. It is a simple matter for the Commission to extrapolate from the economic testimony and the overwhelming evidence from the state impairment cases showing the *lack* of competitive deployment at the

specific capacity levels as demonstrated in the state impairment cases to find that economic impairment clearly exists at or below specified capacity thresholds. AT&T at 24-25. And while administrability concerns would justify ignoring the *de minimis* wholesale provision of loops and transport given the overwhelming state evidence confirming the *absence* of wholesaling at the DS1 and DS3 levels, it also would be an easy matter for the Commission to create exceptions to national impairment findings on routes where multiple competitors certify that they are providing wholesale services at those levels.

And "administrability" could never justify the use of an MSA as the geographic focus for impairment decisions given the inordinately high percentage of *erroneous* determinations that would result – in many cases nearly 100%. In this regard, it is highly ironic that Verizon also seizes on the Court's acknowledgment that the Commission could justify its use of *point-to-point* routes because of relative error costs, *i.e.*, a comparison of the proposed tests' likely – "false positives" and "false negatives." The QSI Analysis of data collected in the state impairment cases, as confirmed by the filings here of the New York Department of Public Service ("New York DPS") and the California Public Service Commission ("California PSC") Staff irrefutably demonstrate that using point-to-point routes as the market definition will produce the fewest erroneous impairment findings – in terms of both "false positives" and "false negatives." That definition produces rules that are the *least* "over-inclusive" and the *least* "under-inclusive." *Compare USTA II,* 359 F.3d at 570 & 575.

Verizon does not contend otherwise. To the contrary, it freely acknowledges that its MSA test will result in a large percentage of errors – findings of non-impairment on routes where alternative facilities are wasteful and where impairment is clear. Verizon at 26. Verizon suggests in its defense a policy argument that a large percentage of false negatives should be of

no concern, because, Verizon asserts, denying unbundling would spur investment where there is impairment.

This is doubly wrong. Foremost, the Court required the Commission to adopt market definitions that will allow reasonably *accurate* impairment determinations, not wildly inaccurate ones that are replete with acknowledged errors. Verizon's argument has nothing to do with impairment – and nothing to do with the Court's narrow critique of the Commission's prior decision. Moreover, Verizon makes no serious attempt to support its proposed market definition on economically sustainable grounds. Indeed, the record evidence shows that – especially given the lack of available capital – competitors will *not* construct *any* new facilities without a viable business case to do so. AT&T at 27-28. Thus, there is no possible reason to believe that eliminating access to UNEs (especially at the very limited levels they would be available) would do anything more than force competitors to retrench. In sum, Verizon's arguments reduce to assertions that the Commission should, as a matter of policy, deny unbundling in areas where impairment exists. But even where it is permissible for the FCC to do so, the Court requires that the Commission first make impairment determinations based on an economically sound market definition and then invoke the "at a minimum" clause.

And in all events, Verizon's policy argument is preposterous. As AT&T and other competitors demonstrate, adoption of Verizon's position would *defeat* the facilities-based competition that is the object of the Act, maintain the ILECs' local monopolies, and also allow them to leverage their vast local market power to dominate previously competitive long distance markets. In short, the Commission should again hold that the relevant market for impairment determinations for loops and transport are point-to-point routes, and it should now expressly reject the MSA proposal that is now advanced by only a single ILEC.

II. THE COMMENTS CONFIRM THAT THE COMMISSION SHOULD RE-ADOPT RULES LIMITING REQUESTING CARRIERS TO 2 DS3S OF LOOPS AND 12 DS3S OF TRANSPORT WITHOUT ADDITIONAL TRIGGERS.

In the *Triennial Review Order*, the Commission found that the natural monopoly characteristics of transmission facilities prevent a competitor from economically constructing its own enterprise loop or dedicated transport facilities unless it has more than 2 DS3s of demand (for loops) or 12 DS3s of demand (for transport) on that specific point-to-point route. *Triennial Review Order* ¶¶ 324, 388. The Bells did not specifically challenge the Commission's analysis on appeal, and the Court did not criticize it. *USTA II*, 359 F.3d at 574-75. On remand, the Bells effectively *concede* the Commission's analysis was correct, because they have abandoned any attempt to show competitors could economically construct their own facilities at or below the Commission's capacity thresholds.

As usual, the Bells have submitted a so-called "fact report," which is nothing more than an unsworn compendium of snippets from news articles and websites that purports to depict the nature of competitors' networks. But now that the Bells' case focuses almost entirely on the availability of special access,[2] their own submissions clearly demonstrate what everyone else has known all along: that *self-deployment* of loops and transport is very limited – at any capacity level. Their maps of downtown areas show extremely limited loop deployment – even in the densest downtown business districts. Selwyn Dec. ¶¶ 47-49. And SBC (at 76-77, citing AT&T witness Giovannucci's testimony in the Illinois state proceeding) also concedes that competitors' transport deployment is effectively limited to *entrance facilities – i.e.*, the points of the very densest demand in competitors' networks.

[2] As shown in Section III, *infra*, competitors are impaired notwithstanding the availability of special access.

Thus, the comments strongly confirm the conservative nature of the Commission's previous capacity thresholds. Many competitors provide sworn declarations confirming that self-deployment below those thresholds is uneconomic and that they do not even consider building their own facilities until they have demand that is at or above the capacity thresholds. The Bells' only attempt to argue otherwise turns on their insistence that, where competitors have deployed facilities, they can "channelize" those facilities to offer service at any capacity. Those arguments are fatally flawed for a host of reasons the Commission recognized in the *Triennial Review Order* and which were not criticized by the Court of Appeals: loop channelization is possible only in the small minority of buildings that support deployment of OCn loops (*Triennial Review Order* ¶ 298); competitors almost never self-provide or wholesale DS1 or DS3 interoffice transport at or below the capacity thresholds (*id.* ¶ 392 & n.1216); and the existence of a single wholesaler is not sufficient to constrain the Bells' monopoly power (*id.* ¶ 413).

And despite spending months gathering data and litigating the details regarding competitive deployment of loop and transport facilities in the states, the Bells completely *ignore* the fact that those data utterly defeat their arguments here. In fact, the Bells typically challenged the Commission's national impairment decisions on loops and transport (if at all) for a only tiny fraction of the buildings and transport routes in individual states, and even then the data showed the Bell challenges were wrong in the vast majority of cases. Thus, the "on the ground" state data of actual marketplace activity that were summarized in the QSI Analysis,[3] and the submissions from the New York DPS and the California PUC Staff demonstrate beyond question

[3] *Ex Parte* Letter from CompTel-Ascent, *et al.* to Marlene Dortch, (filed Oct. 4, 2004) (attaching "Analysis of State Specific Loop and Transport Data," prepared by QSI Consulting, Inc. ("QSI Analysis")).

that the capacity limits – standing alone – predict impairment accurately almost 100% of the time. Moreover, as AT&T's comments showed (at 32-50), the capacity limits alone are actually *very favorable* to the ILECs, because they over-predict non-impairment in many more cases than they under-predict impairment.

In addition, as shown below, the Bells' proposed triggers for delisting DS1 and DS3 loops and transport would generally de-list loops or transport in wire centers that have a certain number of business lines. Such measurements bear no relationship to reality, and they are not reasonable predictors of the demarcation point between impairment and non-impairment – especially when compared to the accuracy of the capacity limits.

Finally, the Bells' so-called "Fact" Report, like their other such reports, is filled with errors, exaggerations, and false and misleading information. Many of its contentions concerning the nature of the enterprise market have already been directly refuted by sworn declarations of the relevant carriers. The report is so riddled with errors that it is entitled to no weight – especially in the face of the sworn testimony provided here and in the states.

A. The Comments Confirm That Self-Deployment Of Loops And Transport Is Economically Infeasible Below The Commission's Capacity Thresholds, And The Bells' "Channelization" Arguments Are Meritless.

The comments – including the Bells' own filings – strongly confirm that *self-deployment* of loops and transport by competitors is economically infeasible below the Commission's capacity thresholds and viable wholesale options are almost never available, even in the largest states. The complete record thus unambiguously demonstrates that competitors remain impaired below those thresholds, and the Commission is clearly authorized to re-adopt them, with no additional mechanisms for de-listing.

The Economics of Facilities Deployment Are Not In Dispute. The economics of loop and transport deployment are driven by certain inescapable facts:

(1) Transmission facilities are characterized by extremely high fixed and sunk costs;

(2) Most of the cost of deploying loops and transport are in the outside plant – the trenching and the underlying infrastructure – and not in the fiber itself. This means that the cost of deploying loops and transport does not vary much at all with the capacity of the fiber; and

(3) The outside plant cost (the main cost driver) increases directly with the length of the transmission facility.

Therefore, the question of whether deployment is economical depends primarily on two factors: the amount of traffic (and associated revenues or other cost offsets) that the competitor can expect to carry over the facility and the length of the facility to be built.

The Commission either explicitly or implicitly recognized many of these factors in the *Triennial Review Order* (¶¶ 73-91, 302-05, 315-27, 370-77, 386-93), and many commenters reiterate them here, *e.g.*, Loop-Transport Coalition at 71 ("a carrier seeking to deploy a DS3 faces the same fixed and sunk costs, such as trenching and attaching to poles, that are involved in deploying any fiber facilities. Yet, carriers are not able to deploy DS3 transport economically because, due to scale economies, carriers serving a DS3 level of demand are unable to recover the costs of deployment over a reasonable time"). Indeed, the fact that loop and transport facilities are characterized by huge scale economies and sunk costs is so obvious and undeniable that the Bells themselves have never even attempted to refute it. They did not challenge this analysis in the Court of Appeals, the Court did not criticize it, *USTA II*, 359 F.3d at 574-75, and the Bells have not offered any direct rebuttal here.

Thus, the only question for the Commission at this point is how to identify the cross-over point at which deployment may become economically justified. In the *Triennial Review Order*,

the Commission found that loop deployment would be economic if the competitor had 3 or more DS3s of committed traffic at that location, and that transport deployment would be economic if the competitor had more than 12 DS3s on that point-to-point route. *Triennial Review Order* ¶¶ 324, 388. Notably, however, those limits were set without regard to the length of the facility the competitor must construct, which is the most important factor in establishing the competitor's construction costs. The evidence here shows beyond a doubt that, at the identified capacity limits, a competitor can afford to construct only an *extremely short* facility before its business case turns negative. Indeed, AT&T showed that, at typical construction costs and revenues, a competitor cannot afford to construct a 2-DS3 loop "lateral" to serve a new location if it must build more than *88 feet*. AT&T at 34-38. And in areas with higher construction costs – principally the dense urban areas where the Bells claim that most high capacity traffic is centralized – a carrier cannot build even that far. *Id.* Moreover, a competitor cannot build a lateral from just any point on its metro fiber; it can only extend a lateral from a pre-designed access (splice) point on that facility, and such points are typically designed at about every 2,000 feet. AT&T, Fea-Giovannucci ¶ 23. Thus, it is obvious that even if a competitor has its own fiber running down a main street it cannot serve many buildings on that same street at only a 2 DS3 level of demand.

Similarly, given that (1) typical construction costs for either competitive loop or transport facilities (excluding electronics), are in the range of *$125,000 per mile*,[4] (2) the costs to establish

[4] *See* AT&T, D'Apolito-Stanley Dec. ¶ 16; Loop-Transport Coalition at 79-80 ("costs of placing fiber underground . . . range from, in the case of Xspedius, $110,880 to $211,200 per mile, or in XO's case, $400,00 to $700,00 per mile. Advance TelCom estimates the costs to be, on a per-linear foot basis, $50 to $75 per foot. In total, deploying transport can require capital of up to $400,000 per mile. Placing fiber on existing poles can be less expensive, but costs still can range from costs still range from $42,000 per mile, or an average of $15 to $20 per linear foot").

a fiber-based collocation are very high (Fea-Giovannucci Dec. ¶ 72), and (3) ILEC local serving offices ("LSOs") are generally located several miles apart,[5] competitors cannot easily afford to establish dozens of collocations in a single local area or to even "possibly" provide transport on many dedicated transport routes in that area. This is confirmed by the data provided to the Commission by the New York Public Service Commission. Out of the 27,000 total possible local transport routes in New York, the PSC found there were three or more self-providers of DS3 transport on only about 135 routes[6] – about four-tenths of one percent. New York DPS at 17-18. That means that even in New York – the most developed competitive market in the country – the *capacity limits alone* correctly identified impairment *over 99.5%* of the time. And given the fact that the capacity limits do not even contemplate distance (or any route- or location-specific factors), it is clear that the capacity limits also *eliminate* UNE availability on a substantial numbers of routes where a competitor could not self-provide facilities even above the capacity limits. Despite this major omission of the distance factor from in the Commission's rules, the commenters have broadly accepted these capacity thresholds as the basis for a national rule. And given the facts now before the Commission, it is undeniable that deployment below the capacity thresholds is *virtually always uneconomic*. *See, e.g.*, MCI at 137-38; NuVox at 7-8; ALTS at 61-63; Loop-Transport Coalition at 81, 99.

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[5] In order to have protection on a transport route, a competitor must build two diverse routes to connect main points on its network. Thus, if it were constructing a facility to connect two ILEC LSOs that are 5 miles apart (a common figure), it would have to construct at least 10 miles of fiber (and probably more).

[6] The New York DPS' comments (at 18) assumed that there are an additional 63 DS3 qualifying routes that were not identified in the earlier New York Staff Report, or incorporated into the QSI Analysis. The figures quoted on the text reflect the adjusted New York data, but they do not materially change the essential facts.

The Incumbents' Huge Natural Monopoly Advantages Reinforce The Validity Of The Capacity Limits. Once a competitor has deployed a metropolitan fiber network, it may be able to construct "laterals" (loops) from that network to individual customer locations. But as AT&T showed (at 34-38), a competitor that will be serving only 2 DS3s of demand cannot afford to construct a lateral of more than a few feet – and most buildings are simply too far away from a pre-designed splice point on competitive fiber to enable the competitive carrier to construct facilities at such a low level of capacity.

The other competitors' comments confirm that they cannot construct loops – of *any* capacity – except to locations that are within a few hundred feet of the existing network, and even then only to locations that have an enormous amount of traffic. *See, e.g.*, Loop-Transport Coalition at 99 (record provided "convincing evidence that it is not cost effective for competitive LECs to self-provision DS3 loops unless a given location has sufficient demand for three DS3 circuits or more"); *id.* at 105 ("as a result, ATI's policy is not to build laterals unless: the customer takes a minimum of DS3 service and is located within 500 feet of the ATI fiber ring, or a minimum of OC-3 service and is located within a half-mile of the ATI fiber ring"); *id.* at 110 ("[t]he cost, delay, and access problems associated with the construction of laterals has forced XO to adopt a policy of not pursuing such construction unless combined customer demand in a building reaches at least three DS3s"). And as AT&T's analysis demonstrates, the DS3 capacity limits are significantly *over-predictive* of non-impairment for competitors, because they do not consider how far a competitor must construct alternative facilities and they also do not account for the many location- and route-specific factors that may prevent a carrier from constructing its

own loops even above the capacity limits and/or when it otherwise has an attractive business case. AT&T at 30-50, 57-61.[7]

However, it should be underscored that the economic reality facing competitors is actually far worse than even the Commission's capacity thresholds would suggest. The economics of serving the enterprise market are necessarily driven by a comparison of the competitor's incremental cost of construction versus the incumbent's incremental cost and the sunk nature of the investment in network facilities. While the incumbent will have already deployed network facilities that can be operated at low incremental cost, a new entrant has not. Fea Reply Dec. ¶¶ 4-31. And because the costs are largely sunk, the new entrant faces enormous risk in incurring the substantial, incremental costs necessary to build transmission facilities. *Id.* If demand for the investment does not materialize (or initially committed demand dries up), the sunk investment will be stranded. *Id.* Thus, the ILECs' enjoy an enormous first-mover advantage over competitive carriers. *Id.*

In his accompanying declaration, Mr. Anthony Fea quantifies the enormous natural monopoly advantages enjoyed by the incumbents. If a competitor is forced to self-provide its own loop at the 2 DS3 (or below) level, its incremental costs include all of the construction costs for that loop. *Id.*¶ 13. In sharp contrast, given their historically protected and ratepayer-funded monopolies, the incumbents were able to build ubiquitous networks that have substantial excess capacity. *Id.* ¶¶ 4-12. Thus, the ILECs have already built their own fiber facilities to most customer locations with sufficient demand, and their (sunk) fiber facilities nearly always include substantial excess capacity. *Id.* And, thus, the incumbent can usually offer the same services as

[7] The attached reply declaration of Anthony Giovannucci also demonstrates that important operational issues such as building access remain real and current.

the competitor over its own loop facilities at a low incremental cost. *Id.* ¶ 14. That is *always* the case when the competitor is seeking to displace service already handled by the ILEC. *Id.* ¶¶ 13-17. But even in the occasional case where the ILEC must increase its capacity, its incremental costs are far less than the competitor's costs, because it only needs to add line cards to its in-place electronics. *Id.* ¶¶ 17-20.

The case is similar for transport. *Id.* ¶ 23. Unlike loops, the incremental outside plant required for transport is typically many miles (rather than only a few hundred feet, as it is for loops) and the incumbent has a greater opportunity to fill the transport facility than a competitor. *Id.* As a result, there is virtually no likelihood that a competitor will construct facilities to connect two ILEC wire centers for the primary purpose of providing traffic between those offices, either at retail or wholesale. *Id.* Rather, a competitor's ability to support new transport construction is limited to facilities that extend short distances – much less than the typical distance between ILEC wire centers – and such facilities are typically used to connect its *backbone network* to traffic aggregation points at selected ILEC wire centers, *i.e.*, to create entrance facilities. *Id.*

The following provides an example, of the relative cost disadvantage a competitor would face if it actually attempted to provide its own new dedicated transport facilities between two ILEC wire centers where it was not already collocated. *Id.* An incumbent LEC can usually accommodate incremental demand of only a few additional DS3s at *no* incremental cost, simply by increasing its fill level on an existing facility. *Id.* ¶ 24. Even if the incumbent has a higher utilization on its interoffice transport, it will generally only need to add plug-in cards – an investment of only $20,000 to $40,000 – to achieve an *incremental OC48* of capacity. *Id.* In contrast, a competitive carrier deploying a typical new dedicated transport route between two

ILEC offices that are five miles apart (a common distance) must (i) establish a collocation at each end of the route (investment of at least $100,000 per end, total $200,000), (ii) deploy an optical multiplexer with 2 OC48 cards (one "hot" and one spare) at each end ($33,000 per end or $66,000 total), and (iii) deploy diversely routed outside plant a distance of twelve miles, which requires an investment of at least $1.6 million.[8] *Id.* ¶ 25. Thus, the incremental cost of the transport route capacity – at an OC48 level, four times the capacity that may be purchased as a UNE – is $1.85 million for the new entrant, compared to $40,000 for the incumbent – a 46-fold advantage.[9] *Id.*

Competitors Almost Never Self-Deploy Or Wholesale Competitive DS1 Or DS3 "Dedicated Transport." The above facts show that, even under the interpretation of the facts most generous to the ILECs, competitors are limited to deployment of *very short* transmission facilities on the *very highest* capacity routes, and as discussed below there is no marketplace evidence that competitors do anything more. For example, the comments make clear that competitors almost never even consider deploying "dedicated transport" – *i.e.*, transmission links connecting ILEC LSOs. Such links are usually several miles long, and the above analysis shows that the outside plant cost associated with such deployment would be prohibitively expensive for any competitor. That is in fact why evidence of self-provided – and wholesale – dedicated transport as defined in the *Triennial Review Order* is so rare. It is simply too costly and operationally difficult to implement. This also further explains why it is not reasonable to

[8] Two wire centers that are five airline miles apart are typically six route miles distant. If a diverse path is required and both paths can route directly (*i.e.*, there are no intervening obstacles requiring major re-routing), at least 12 miles of outside plant is required. This is an investment easily in the range of $1.58 to $4.75 million. *Id.* ¶ 25.

[9] The incumbent's advantage may be further heightened by the fact that it can achieve much higher fill rates than a competitor.

anticipate that the rare instances of DS3 transport (or wholesale DS1 or DS3 transport) on any particular route provides a reliable inference that other carriers will offer a similar alternative on the *same* route, much less any other particular route.

These facts also explain why virtually all competitively deployed "transport" is in fact "entrance facilities" – *i.e.*, short links between an ILEC LSO (at which the competitor has aggregated a large amount of traffic from several subtending LSOs) and a competitor's own network. AT&T at 43-44; *see also* Loop-Transport Coalition, Duke Dec. ¶ 16 ("KMC's transport facilities are designed and used only to carry traffic between a single ILEC (or IXC) central office and the KMC central office").

All of this is also consistent with efficient competitive network design. When viewed in the context of a competitive carrier's network design (as opposed to ILEC network design), competitors use ILEC transport (whether "dedicated transport" or "entrance facilities") only to bring traffic from customer locations to the competitor's service node. Indeed, SBC now admits – citing to AT&T testimony – that competitors use "transport" *solely* as entrance facilities. *See* SBC at 76-77 (citing testimony of AT&T witness Anthony Giovannucci in the Illinois state proceeding).

Moreover, the commenters confirm that, even when a competitor has two collocations in a local area, it generally does *not* configure its network to provide connectivity *between* those ILEC LSOs. Rather, as AT&T showed (at 45-46) and other carriers confirm, competitive networks are configured in a hub-and-spoke arrangement; they are *not* any-point-to-any-point networks like the ILECs'. Loop-Transport Coalition, Duke Dec. ¶ 16 ("[t]his architecture is essentially a 'spoke-and-hub arrangement,' or two-point ring, that carries traffic to and from individual collocations and the KMC switch, *but not between two collocations*") (emphasis

added). As KMC's witness explains, "[t]his configuration establishes direct physical connectivity between the specific ILEC or IXC collocation (node 1) and the KMC central office (node 2) on a two node ring using the same transmission system. It does *not* establish direct connectivity or transport between two ILEC or IXC offices or collocations." *Id.* (emphasis added).

Nor could a competitor typically reconfigure its network to economically provide such connections, on either a retail or wholesale basis. KMC explains that "[i]f KMC wanted to provide transport between two ILEC collocations, it would need to perform substantial upgrades to the electronics (to increase bandwidth) at all ILEC collocations and at the KMC node," as well as upgrading "the Digital Access Cross-connect System ("DACS") in the KMC switch." Loop-Transport Coalition, Duke Dec. ¶ 16. The "additional network functions necessary to provide this connectivity," in turn, would "directly impact the bandwidth requirement on the SONET ring and capacity and termination requirements on the DACS," and therefore "[a]dditional capital would be necessary to support reconfiguring the network and upgrading the transmission equipment and the DACS." *Id.*; *see also* AT&T, Fea-Giovannucci Dec. ¶¶ 17-21.

And in order for a competitor to establish a wholesale offer a competitor must also incur additional costs and face significant operational problems. As KMC explains, "providing wholesale transport would also drive costly expansion of space and power requirements to accommodate additional electronics in the ILEC central office collocation," which would entail "substantial changes" from the ILECs, and "KMC would also have to incur increased costs for network monitoring and surveillance demands." As KMC's witness explains, "KMC would not make the investments without prior commitments." Loop-Transport Coalition, Duke Dec. ¶ 20. And as ATI's witness adds,

> [e]ven when another CLEC has a wholesale DS-3 transport offering available on a route, it must be recognized that we incur significant additional costs when we elect to use it. Since a third-party carrier rarely (if ever) can provide all of the routes we need in a metro area, electing to utilize a third-party carrier requires us to incur the cost of making and managing service arrangements with multiple suppliers. These additional costs primarily consist of ordering, as Special Access, a finished service that completes the DS-3 transport connection between the alternate carriers POP and the actual ILEC Central Office, including terminating that DS-3 transport circuit into the Advanced TelCom ILEC Collocation Cage at both ends. This additional cost can be exorbitant versus a complete end-to-end DS-3 transport facility that we utilize today. In addition, service quality become more difficult to maintain; maintenance and repair in particular becomes more problematic.

Loop-Transport Coalition, Wigger Dec. ¶ 42.[10]

The State Data Confirm The Validity Of The Capacity Limits. All of these facts are strongly confirmed by the evidence of actual competitive deployment from the state cases and the state commission commenters. As shown previously, after analyzing available data from 12 states (for loops) and 14 states (for transport), the QSI Analysis showed that

> (1) There are *collectively* only 130 buildings in *12 states* (including California, Texas, Florida, Georgia, Illinois and Michigan) that have two or more self-providers of loops with less than 2 DS3s of capacity;
>
> (2) That there are fewer than 50 buildings – in those 12 states *combined* – where wholesale DS3 or DS1 loops are available;

[10] *See also* ALTS at 73 (noting both (i) "specific entry barriers associated with wholesale offerings of interoffice transport, such as the need to obtain cross-connects from the purchaser's collocated equipment to the wholesaler's collocated equipment, a barrier that (like collocation itself) is controlled by the incumbent that provides the cross-connection," and (ii) "the substantial transaction costs and service degradation associated with the need to obtain wholesale transport from multiple providers along a particular route," citing *Triennial Review Order* ¶ 373).

(3) There are only a *total* of about 100 transport routes in *14 states* (including all the above states plus New York and Washington) with three or more self-providers of DS3 transport;[11] and

(4) there are fewer than 50 routes in all those 14 states where there are two or more wholesalers of DS3 or DS1 transport. Notably, the California PUC Staff Report (at 9-10) supports QSI's analysis that the wholesale triggers for both DS3 loops and DS3 transport were not satisfied on a single route in the entire state – in either SBC or Verizon territory.

These data, all of which were based on carriers' sworn discovery responses, demonstrate beyond a shadow of a doubt that the trivial competitive deployment of facilities below the capacity thresholds does not even rise to a *de minimis* level and can easily be ignored in establishing a general national impairment rule.

The Bells' "Channelization" Argument Is Meritless. The Bells have no answer to the Commission's analysis concerning the enormous scale economies and sunk costs involved in loop and transport deployment. Indeed, the Bells have never offered any direct rebuttal to the Commission's analysis, which the Court did not criticize.

The Bells' only attempt to demonstrate a lack of impairment for DS1 and DS3 level elements is to rely heavily on the notion that, once a competitor has constructed fiber loop facilities to a location, they can be "channelized" with multiplexers to provide service at varying capacities, including DS1 and DS3. *See* Bell Report at III-10; SBC at 85-86; BellSouth at 47-48.

[11] As noted above, the New York DPS' comments assumed the addition of 63 self-provisioned DS3 transport routes that had not been identified by Staff. However, that difference, which is reflected in the text, represents only about *one-tenth of one percent* of the 27,000 possible transport routes in New York, an immaterial difference in the predictive power of the capacity limits as a test of impairment.

From this fact, the Bells draw the conclusion that, once any one competitor has deployed a loop or transport facility, that the competitor can *either* self-provide *or* wholesale any capacity service (including DS1 or DS3), and that the bandwidth required by individual customers is therefore irrelevant to the impairment analysis. Bell Report at III-10-11.

That is incorrect for a host of reasons, and it flies directly in the face of the Commission's findings in the *Triennial Review Order*. With regard to loops, even the Bells admit that a competitor can channelize *only* in the small number of buildings where it has enough traffic to build an OCn facility. *Cf.* Bell Report at III-11 (channelization possible only where "competitive fiber itself is at hand"). In all *other* buildings – which constitute the vast majority of the entire market for the DS1 and DS3 loops at issue here – a competitor could not possibly construct its own loop facilities. AT&T, D'Apolito-Stanley Dec. ¶ 12-24. As AT&T has shown, the vast majority of even its customer locations that are within one mile of its network are served by only a small number of DS1s, and almost all have fewer than 2 DS3s of demand. AT&T, Fea-Giovannucci Dec. ¶ 59. As a result, even accepting the "possibility" of channelization, that fact alone could only eliminate impairment for DS1 and DS3 loops in a tiny fraction of enterprise customer locations. And competitors are still left with only the ILEC as a source of supply in virtually all other locations. AT&T, Fea-Giovannucci Dec. ¶ 65; Stith Dec. ¶¶ 21-24.

Moreover, regardless of the Bells' simplistic arguments – and their attempts to hide their heads in the sand – the existence of "channelization" is not reflected at all in the real world. In fact, there is virtually *no* wholesaling at the DS1 or DS3 levels by anyone – anywhere. There are many reasons why. First, the wholesale market is largely locked up by the Bells' anticompetitive tariff provisions. *See, e.g.*, Section IV, *infra.* Second, as shown in the discussion above,

establishing wholesale alternatives is not readily accomplished. And a loop wholesaler is obviously of no use to a competitive carrier if the wholesaler does not have access to an entire building. *Triennial Review Order* ¶ 337. Moreover, the real-world evidence demonstrates that full building access (necessary for a wholesale loop alternative) is also rare. *See* AT&T at 59 & Fea-Giovannucci Dec. ¶ 44; MCI at 140. And that explains, of course, why the Commission found such a paucity of loop wholesaling, *Triennial Review Order* ¶¶ 325 ("[t]he record contains . . . scant evidence of wholesale alternatives for serving customers at the DS1 level"), 321 ("the record reflects a small but *potentially* growing wholesale alternative DS3 loop market"), why competitors report a severe lack of competitive alternatives to UNE loops and transport at the DS1 and DS3 levels, and why the state data confirm the absence of any meaningful wholesaling at these levels.

Further, the Bells' arguments implicitly (but wrongly) assume that a single alternative is sufficient to demonstrate a lack of impairment. As the Commission has previously recognized, a single firm is insufficient to establish a lack of impairment, for either self-provisioning or wholesaling purposes. Relying on a single self-provisioner as evidence that other firms could also self-provision their own facilities would, among other things, utterly ignore the enormously high failure rate of competitive firms that built facilities without assuring that they had enough revenues to support them. These failures will never be repeated by any reasonably efficient (or prudent) carrier, especially given the substantial capital restraints in today's market. *See* AT&T, D'Apolito-Stanley ¶ 3; Loop-Transport Coalition, Wigger Dec. ¶ 33. It would also ignore that a carrier that is currently providing only a limited amount of service on a particular facility may have served a larger demand in the past but then lost business.

Similarly, consistent with a long history of judicial and Commission precedent, the *Triennial Review Order* correctly found that the presence of a single wholesaler is insufficient to restrain the ILECs' undeniable market power. "Where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding." *FTC v. PPG Indus. Inc.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986). As the Supreme Court has explained, "firms in a concentrated market" can "in effect *share* monopoly power . . . by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (emphasis added). *See also FTC* v. *Heinz*, 246 F.3d 708 at 725 (D.C. Cir. 2001) ("The creation of a durable duopoly affords both the opportunity and incentive for *both* firms to coordinate to increase prices."); *PPG Indus.*, 628 F. Supp. at 885 n.9 ("The relative lack of competitors eases coordination of actions, explicitly or implicitly, among the remaining few to approximate the performance of a monopolist."). Thus, as the Commission itself has held, "both economic theory and empirical studies" indicate that "*five* or more *relatively equally sized firms*" are necessary to achieve a "level of market performance comparable to a fragmented, structurally competitive market." *Mass Media Order* ¶ 289 (emphasis added).

In the *Triennial Review Order*, the Commission correctly found that the risk of umbrella pricing is "high" when only one wholesale competitor enters the market in competition with the incumbent LEC, "but substantially reduced when two or more competitors provide wholesale transport in competition with the market leader, the incumbent LEC." *Id.* ¶ 413 n.1275. The Commission thus found that at least two wholesalers are needed to "provide competitive pressures on pricing and terms and avoid 'umbrella pricing' while providing incentives to deploy." *Id.* ¶ 413.

With respect to dedicated transport, the comments make clear that it is unreasonable to expect competitors *ever* to *self-provide* DS3 or DS1 capacity service between ILEC offices. As AT&T has previously explained (at 43-44), competitors' transport deployment is typically designed to function purely as entrance facilities at very high OCn levels. Even when competitors have two collocations in an area, they almost never establish connectivity *between* those collocations, and certainly not at the DS1 or DS3 level. As explained above, to do so would require expensive investments in multiplexing equipment and digital cross-connects that would not be cost-effective. AT&T, Fea-Giovannucci Dec. ¶¶ 17-21.

Finally, even if competitors did "channelize" their facilities to provide DS1s and DS3s for themselves where they have deployed transport, they certainly do not offer such services at *wholesale*. The Bells claim that the Commission's contrary conclusion in the *Triennial Review Order* was based on testimony of KMC, which established that such a wholesale offering would require an entirely different business model and substantial investment in extensive operations support systems. Bell Report at III-13 & n.31. The Bell Report confidently intones that KMC now provides such wholesale services. *Id.* at III-13 n.31. Once again, however, the Bells' "fact gathering" methods are exposed as merely the aggressive misreading of websites. As explained above, KMC's own witness makes crystal clear that KMC does *not* offer transport at wholesale, and indeed, it would have to reconfigure its network and change its entire business plan to do so. Loop-Transport Coalition, Duke Dec. ¶¶ 16-20. Similarly, AT&T does not offer DS1 or DS3 "dedicated transport" available at wholesale.[12]

[12] Qwest devotes considerable space to the preposterous argument that loop and transport facilities have no natural monopoly characteristics. *See* Qwest at 83-85. Qwest is literally suggesting that competitors could economically replicate the ILECs' entire transmission network, and that such a deployment would not be a waste of social resources. *Id.* Merely to (continued . . .)

B. The Bells' Alternative Proposals For Identifying Non-Impairment For Lower Capacity DS1 And DS3 UNEs Are Grossly Overbroad And Must Be Rejected In Favor Of The Much More Precisely Calibrated Capacity Limits.

Although the Bells oppose unbundled access to any DS1 or DS3 loops or transport, they have made other proposals in the alternative that would result in the broad elimination of unbundled access to these elements. These proposals fall into two broad categories. First, Verizon, SBC, and BellSouth all suggest that competitors should be denied access to all high capacity loop and transport UNEs in wire centers with a certain number of business lines. Second, Verizon proposes some additional criteria that would deny unbundled access to high capacity loop and transport UNEs on an MSA-wide basis.

All of these proposals would result in an extremely broad denial of unbundled access – even to DS1 loops and transport – and all presuppose that impairment is eliminated because of the availability of ILEC special access services. Thus, these proposals must rise or fall on the strength of the arguments discussed in Part III below, which shows that the Bells' special access claims are baseless and are properly rejected under the express guidance provided in *USTA II*.

And in all events, the Bells make no serious attempt to defend any of these proposals as reasonable if special access is deemed irrelevant to impairment decisions. It is also clear that all of these tests would eliminate unbundled access in huge numbers of situations where facilities-based entry is infeasible – far more cases that when such entry is feasible. Thus, these tests would result in massive numbers of "false positives" (incorrect findings of non-impairment) in each of the wire centers or MSAs where they would be applied. *USTA II*, 359 F.3d at 575. The

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(. . . continued)
state this argument is to refute it. In all events, the Court recognized that the Commission's general impairment standard is in fact well grounded in characteristics of natural monopolies. *USTA II*, 359 F.3d at 571-72.

Commission must reject these approaches, since they are all much less predictive of non-impairment than the capacity limits alone, without any additional criteria.[13]

Wire Center Approaches. Verizon, SBC and BellSouth propose new impairment tests that would deny competitors access to loop and transport UNEs in wire centers with a certain number of "business" lines. Verizon and BellSouth propose to eliminate unbundled access to both loops and transport in any wire center that has 5,000 or more business lines. Verizon at 82-83; BellSouth at 39-50. SBC's proposal is slightly more measured: it would eliminate access to transport on routes that have 10,000 business lines in the wire centers on each end of the route, or on routes where the wire centers have at least 5,000 business lines on one end and 10,000 on the other. SBC at 77-79. SBC would also eliminate access to loops in wire centers that have 15,000 business lines and at least *one* building served by competitive fiber. SBC at 88-89.

As a threshold matter, it is not exactly clear what the Bells (or any other carriers) mean by the term "business" lines. We presume for these purposes that it is intended to include only switched lines, but the carriers using those terms have not been explicit. Moreover, there is no single audited source for such data at the wire center level, so the use of line counts will likely to be subject to multiple interpretations.

Most important, however, is the fact that none of the Bell tests accurately predicts *either* the existence of actual facilities-based entry *or* of wholesaling. Indeed, the entire notion of using wire centers with a certain number of business lines to predict transport – and especially loop –

[13] If the Commission were to consider any form of these tests, it could not reasonably apply any capacity thresholds to DS1 or DS3 loops or transport in areas where such elements remain available. Indeed, with the exception of SBC (at 79 n.253 & 89 n.272), none of the Bells even suggests that there should be capacity limits in such areas. To adopt capacity limits in such circumstances would arbitrarily allow the Bells to have it both ways.

deployment is at best indirect, and in all events is deeply flawed. The Commission's impairment analysis (as sustained by the Court of Appeals) already establishes that the question of whether a carrier will construct loops or transport on any given route is principally a function of the amount of committed traffic that carrier can expect to carry on that route. In contrast, as AT&T showed, the mere size of a wire center, or the total number of "business" lines in a wire center, does not play a significant role in an efficient carrier's decision as to where to deploy its facilities or establish a facilities-based collocation. *See* AT&T, Fea-Giovannucci Dec. ¶ 15 & n.4. The principal factor in the latter decision is the ability to minimize the total transport mileage (and costs) between (1) a hub collocation and all of the offices that "home" on it and (2) the hub and the proposed access point on the competitor's metro fiber. In fact, AT&T's own pattern of collocations does not establish any strong correlation with wire center size, especially at the limited line counts the Bells suggest.

The Bells claim that they are trying (at least indirectly) to meet the Court's concerns to identify the underlying circumstances in which competitive deployment is potentially viable, *see, e.g.,* SBC at 6; *USTA II*, 359 F.3d at 575. But the Commission's capacity thresholds *already* do that. The capacity thresholds are not limited to situations where one or more competitors have already deployed facilities (*cf. USTA II*, 359 F.3d at 575); rather, they identify the economic breakpoint at which deployment may be feasible (at least at a short distance), and they deny competitive access to UNEs above the thresholds to *any* carrier, regardless of whether that carrier actually builds (or *could* economically build) facilities on that route. In other words, the Commission's capacity thresholds already identify – indeed, *over*-predict – virtually all of the situations across the country where entry is potentially feasible, and they do so *specifically* for *every* carrier on *every* route in the country. Additional criteria – and certainly those that are at

best indirectly related to what is actually being measured – are not only unnecessary, but would lead to massive errors – "false positives," in the court's language – that are directly contradicted by all of the available evidence.

The Bells attempt to justify their transport proposals principally on the ground that the number of business lines in a wire center has some loose correlation with the presence of a fiber-based collocation in that wire center. For example, the Bell Report claims that at least one competitor has established a fiber-based collocation in slightly more than *half* of the Bells' wire centers that have 5,000 or more business lines. *See* Bell Report at III-25-26 & Table 17. Even accepting the Bells' data, however, the correlation between the existence of 5,000 switched business lines in a wire center[14] and even *one* fiber-based collocation is only about *50 percent*. Thus, by their own admission – and even assuming that a *single* transport competitor were sufficient to provide competitive pressure to the Bells' market power (as it is not, *see* section II.A, *supra*) – the Bells' proposed criterion would only be right about half of the time, resulting in massive false positives.

Moreover, Verizon and BellSouth's test would eliminate unbundled access on *all* routes emanating from that wire center, which would also be grossly over inclusive of non-impairment. The mere fact that *some* carrier may have built *entrance facilities* into a wire center says nothing at all about impairment on the various *interoffice transport* routes between ILEC LSOs that emanate from that wire center. Indeed, as AT&T has shown, competitors' impairment is greatest on such routes (because of their extreme length), so that it is unlikely that any competitor has

[14] Since *data* services are increasingly the driver of facilities deployment, a test that is centered on *switched* business lines is likely to give undue weight to a number of wire centers that have little demand for data services (and thus are unlikely to see facilities deployment at all).

even established connectivity between the offices defining the route, much less a wholesaling business. AT&T, Fea-Giovannucci Dec. ¶¶ 17-21. And as the Commission has found, even a minimally competitive market requires at least *two* wholesalers. *Triennial Review Order* ¶ 413.

The Bells' justifications for applying a wire center test to *loops* are especially absurd. As noted above, SBC would eliminate access to DS1 loops in any wire center that has (1) 15,000 business lines and (2) at least *one* building served by a competitor's self-deployed loop – of any capacity. SBC defends these conditions by noting that, in its wire centers with 15,000 or more business lines, 91 percent of those wire centers have at least *one* "lit" building, and such wire centers have on average 10.6 lit competitor buildings. SBC at 89. One can only wonder if even SBC takes this proposal seriously.

Taking SBC's own data at face value, such a test would be about as inaccurate a predictor of loop deployment as one could imagine. This test would eliminate UNE access to even *DS1* loops for wire centers with at least 15,000 business lines (actually far more when data and other private line services are taken into account), even though competitors had only constructed their own loops – of any capacity – to a *single* location served by that wire center. On its face, such a test would *guarantee* tens of thousands of "false positives," and could not possibly pass muster under *USTA II*, 359 F.3d at 575. But at least SBC attempted, however inadequately, to justify its proposed test. In contrast, Verizon and BellSouth offer *no* separate justification *at all* for eliminating access to loops based on the number of business lines in a wire center, completely ignoring *all* aspects of the Commission's impairment test. These baseless proposals are patently inadequate and cannot rationally be adopted. Indeed, doing so would fly in the face of the Court of Appeals' requirement that an impairment test bear a reasonable relationship to the costs or other structural impediments that relate to the ILECs' natural monopolies.

Most importantly, of course, the Bells make no effort at all to demonstrate that their proposed tests are more accurate than the capacity limits. As the state data clearly show, there could hardly be a better "fit" between the capacity limits and competitive impairment. Thus, there is no rational basis upon which the Commission could accept the Bells' proposals and still remain consistent with the requirements of *USTA II*.

MSA Approaches. Verizon alone makes two proposals that would deny competitors access to unbundling on an MSA-wide basis. First, it proposes to "eliminate unbundling of high-capacity UNEs in any MSAs in which Verizon has already qualified for any degree of special access pricing flexibility," if competing carriers are using special access to serve customers. Verizon at 83. Second, it proposes to "eliminate unbundling of high-capacity UNEs in any MSAs in which at least half of the DS1 loops served by the incumbent LEC in that MSA are in wire centers where competing carriers have deployed fiber," again where competitors are serving their own customers with their own fiber or through ILEC special access. Both of these proposals are grossly overbroad and must be rejected.

First, an MSA is *not* an appropriate market for *any* type of unbundling relief. In the *Triennial Review Order*, the Commission determined that the relevant geographic market was point-to-point, and on that basis established route-specific rules that, where satisfied, would establish non-impairment on a route-specific, point-to-point basis. In a stunning reversal of a position that they and other Bell economists have argued for years, Verizon declarants Kahn and Tardiff challenge that determination, arguing that "the geographic scope of the relevant markets is at least as large as a metropolitan statistical area (MSA)." Verizon, Kahn-Tardiff Dec. ¶ 14. That is flatly wrong, especially in the enterprise market, where carriers make sales to meet the *individualized* needs of larger and more sophisticated telecommunications users, typically under

term contracts. As shown in AT&T's opening comments (at 16), Alfred Kahn and other Bell economists have consistently – and correctly – asserted that the market for special access services is point-to-point. They cannot credibly shift gears here and claim that the market for the very same functionality when offered over the very same facilities is MSA-wide.

The overwhelming evidence in the comments, including in particular evidence submitted by the Bells themselves, confirms that competitors self-deploy their own high capacity loop and transport facilities *only* on specific routes of the *highest density*, typically within the principal business districts of major metropolitan areas – and even in those areas the vast majority of locations where competitors provide service to enterprise customers still require the use of *ILEC* facilities to provide "last-mile" connections. *E.g.*, AT&T at 39-40 & Fea-Giovannucci Dec. ¶¶ 62; *see also* Selwyn Reply Dec. ¶¶ 92-93.

Moreover, even if effective, price-constraining competition were present in limited portions of an MSA – which is clearly *not* the case – there would be no reasonable basis to infer non-impairment throughout the *remainder* of the MSA, where no such facilities-based competition is present. Most MSAs are expansive areas – indeed, some are larger in total area than many states. For many MSAs, the areas of relatively high concentration represent only a small fraction of the overall MSA geography. And the various maps proffered by the Bells confirm that the presence of non-Bell fiber optic facilities is typically even *more* limited, usually a small number of individual streets in the central business district, and in some cases to specific concentrations of demand in a few suburban areas.

Access line facilities are not fungible from one location to another. The fact that a competitor might own facilities supporting a limited array of service offerings and serving a handful of individual buildings on a particular street in a particular zip code does not make such

competitively owned facilities available ubiquitously throughout the entire MSA. There is in fact a wealth of evidence in this proceeding refuting Kahn and Tardiff's unsupported flip-flop claim that "[f]acilities-based competitors can and do expand into nearby locations (or routes)." *See* Selwyn Reply Dec. ¶¶ 92-93. And of course their testimony does not focus at all on the capacity level of the facilities discussed. Expansion may (in some cases) be possible in nearby areas – but only at very high capacity levels, much higher than those at issue here.

As AT&T and other competitors have shown, the mere presence of competitive facilities at a particular location does not by itself create a potential for economical entry into even adjacent or close-by locations. This inescapable fact is confirmed across all of the MSAs for which the Bells have provided maps. For example, SBC's map of the San Francisco financial district identifies a total of 438 buildings being served by competitors using SBC special access facilities that are physically located on the *same streets* where competitive fiber is also present, whereas only 68 buildings are actually connected to that competitive fiber. *See* AT&T, Selwyn Dec. ¶¶ 47-49. This confirms the general proposition that expansion is only possible under limited circumstances, virtually all of which require that a competitor have more than 2 (or 12) DS3s of committed demand for loop or transport facilities, respectively.

The *Pricing Flexibility Order* is not to the contrary. The entry barriers that the Commission has identified for loops and transport are route-specific. See Section I, *supra*. Therefore, the use of vastly larger geographic areas like MSAs would have radically higher "error costs" – in terms of both false positives and false negatives – than a market definition that is based on point-to-point routes. *USTA II,* 359 F.3d at 570, 575. In the *Pricing Flexibility Order*, the Commission explicitly recognized that pricing flexibility petitions focused on smaller geographic areas such as wire centers "might produce a more finely-tuned picture of competitive

conditions." *Pricing Flexibility Order* ¶ 74. The Commission was quite clear that it was using the MSA purely as an administrative compromise between alternative market definitions involving either larger or smaller geographic areas. *Pricing Flexibility Order* ¶ 73-74. There is such a close fit between the capacity limits and impairment that there are *no* legitimate administrability concerns that could support anything other than a route-by-route approach here.

Accordingly, it is not surprising that Verizon's attempts to defend its proposals are nonsensical. First of all, Verizon effectively concedes that competitors could never deploy low-capacity facilities throughout an MSA. Thus, it defends both of these tests on the ground that ILEC special access is available. Verizon at 84-85. Indeed, Verizon defends its second proposal almost entirely on that ground. As shown in Section III, *infra*, special access is not an effective substitute.

As to the first proposal, Verizon contends that elimination of unbundling should follow pricing flexibility relief, because the test for pricing flexibility is "more stringent" than the test for impairment. That is nonsense. In the *Pricing Flexibility Order*, the Commission emphasized that the ILECs *retain* market power in special access services *even after* Phase II relief has been granted, and acknowledged that the Bells could use that market power in portions of the MSA where there were no competitive facilities. *Pricing Flexibility Order* ¶¶ 151-55. The Commission erred on the side of a larger geographic area for relief partially because it believed that, on balance, MSA-wide relief would facilitate a rebalancing of rates that would permit the Bells to respond to competitors' lower access rates in the limited areas in which *some* competition had emerged (a concern not relevant here). *Id.* ¶¶ 20, 60, 92, 154-55. But as AT&T and others have abundantly documented elsewhere, the Bells have *not* used that flexibility to respond to competitors. Instead, they have used it to *raise* their rates to monopoly levels even in

the dense downtowns where competitive entry is greatest. *See* AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access (filed in RM No. 10593, Oct. 15, 2002), petition for mandamus pending, *In re AT&T Corp., et al.*, No. 03-1397 (D.C. Cir.). Thus, Verizon's proposals are baseless and must be rejected as significantly inferior to the capacity limits in their predictive capability.

MCI's Collocation Test. Finally, MCI proposes a test in which an ILEC could show non-impairment on a particular transport route if there are four fiber-based collocators on each end. MCI at 141-42. Unlike the "business-lines-in-a-wire-center" test, this proposal at least recognizes that there is not even a prayer that a competitor could establish connections between two ILEC wire centers – much less establish a wholesale business – unless it has *already* established fiber-based collocations on both ends of a dedicated transport route, albeit for independent reasons. As MCI recognizes, the mere fact that a carrier is collocated in two wire centers generally does *not* mean that that carrier has actually established connectivity between them. *Id.* at 142-43. MCI notes, however, that it is theoretically possible for a carrier to provide that connectivity, *if* it overcomes a number of economic and operational hurdles. Thus, as it explains, a "four-collocator" rule could function as a "potential" deployment test – *i.e.*, it is conceivable that "a subset of the four CLECs that have collocated on both ends of the route have or could overcome the remaining barriers to provide DS3 transport." *Id.* at 144.

But as shown above, the comments overwhelmingly establish that competitors virtually *never* provide wholesale transport. Merely *assuming* that some carriers might provide a wholesale alternative on routes where they are not even connected is thus a poor substitute for a test that requires *actual* wholesalers. As AT&T previously explained, the Commission could adopt a test that required two wholesalers on a route, relying on wholesaler self-certification,

since it would be in the competitor's interest to announce its wholesale offer and thus eliminate UNE pricing on the relevant route. Thus, the MCI test cannot resonably be adopted, since it fails to incorporate any evidence that actual wholesaling has developed, or is likely to develop. And as AT&T has shown, there is practically no likelihood that significant wholesaling will develop unless the Commission invalidates the lock-up provisions and related termination and shortfall liabilities in ILEC access tariffs. *See* AT&T at 153-65.

C. The Bells' Specific Claims Concerning Competitive Deployment Of Loops And Transport Are Grossly Overstated And Unreliable.

The Bells have again offered an unsworn "fact" report, prepared by their lawyers, that cobbles together snippets of news articles, financial reports, and various websites in an attempt to argue that competitive deployment of loops and transport is exploding in all directions. As with all past Bell reports, however, once one scratches beneath the surface, the Bells' claims fall apart as grossly exaggerated, misleading, and internally contradictory. Many of the Bells' claims concerning particular companies have already been directly contradicted here by sworn declarations of the relevant company's officers and employees. Because the Bells' "fact gathering" methods have proven to be so shoddy and unreliable, the Commission should give this lawyer-generated report no weight – especially given the much more reliable data now available from the state proceedings and state commenters.[15]

[15] Verizon also repeats its baseless assertion that the Commission can essentially treat a small subset of wire centers with the most traffic in the twenty largest MSAs in its region as the entire relevant market. Verizon at 36. As AT&T demonstrated in its opening comments, Verizon's analysis essentially identifies the small subset of wire centers with the most demand for *OCn* services; the only issue in this proceeding, however, is whether and where *DS1 and DS3* loops and transport should be made available on an unbundled basis. As AT&T demonstrated, competitors purchase a large of amount of DS1 and DS3 services outside that small subset of wire centers in Verizon's twenty largest MSAs. AT&T at 66-67 & Stith Dec. ¶¶ 21-24. (continued . . .)

1. Loops.

In its opening comments, AT&T submitted a detailed business case, drawn from AT&T's own actual business cases since the beginning of 2003, which demonstrated that a competitor cannot economically construct its own loops to a location unless it has more than 2 DS3s of traffic at that location, and even then, the feasibility of construction depends on how far the building is located from a pre-existing splice point on the competitor's network. *See* AT&T at 34-38 & D'Apolito-Stanley Dec. ¶¶ 12-24. And even where loop construction would be economically justified, other obstacles, such as lack of building access, can thwart construction. AT&T at 57-61. Other competitors' comments confirm that loop construction is uneconomic below the Commission's capacity thresholds, and that elimination of unbundled access to DS1 and DS3 loops would deal a devastating blow to their businesses. *E.g.,* Loop-Transport Coalition at 75. None of the Bells' "evidence" contradicts or undermines these showings in any way.

The Bells' Building Data Confirm That Facilities-Based Entry Is Rare. In this remand proceeding, the Bells now rely heavily on the fact that competitors serve individual locations principally through ILEC special access – not through the use of self-deployed facilities. For example, SBC has submitted street maps that purport to show the buildings where competitors have deployed fiber and those where they rely on ILEC special access. As AT&T demonstrated, however, those maps show that competitors have deployed their own facilities in only a small percentage of cases – even when the analysis is confined to *same streets and city blocks* in dense downtown business districts of major cities where competitors have deployed

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(. . . continued)
Limiting the analysis to the small subset with the greatest OCn demand would improperly define away much of the market at issue. AT&T at 67.

some fiber. AT&T at 69. And SBC reads its maps the same way. SBC at 84 (emphasizing that its maps depicting dense downtown business districts show the "abundant use that CLECs make of special access").[16]

The Bells' other building data also confirm that self-deployment by competitors is the exception, not the rule. For example, Verizon asserts (at 48) that competitors claim they have built their own loop facilities to some 31,000 buildings nationwide. Similarly, SBC asserts that, in its wire centers that serve 15,000 or more business customers, competitors have an average of only 10.6 "lit" buildings – again, a tiny fraction of the whole. SBC at 89. The truth is that enterprise customers are located in *millions* of buildings around the country. Selwyn Dec. ¶ 44. Moreover, even in buildings where competitive carriers have constructed facilities – at *any* capacity level – they typically do *not* have access to all customers in the building. Fea-Giovannucci Dec. ¶ 44. And that is the real point: the Bells offer no evidence that competitors (1) can build their own loops to serve only 2 or fewer DS3s of capacity or (2) competitors that actually serve buildings (at any capacity level) make loops available at wholesale. Indeed, all of the evidence before the Commission is to the contrary.[17] *See also* Selwyn Reply Dec. ¶ 10-11.

Although the Bells' own inflated data show that self-deployment is limited, they claim that AT&T and other competitors have refused to provide data on the extent of their facilities

[16] As AT&T previously explained, the Bells' street maps overstate the existence of competitor-deployed loops, because their data are derived from data provided by GeoResults, which in turn relies on data from Telcordia that overstates the extent of competitive deployment. *See* AT&T at 71-72 & Beemon Dec. ¶¶ 6-8.

[17] The Bell Report itself asserts that by 1996 there were 24,000 competitor on-net buildings. Bell Report at I-2, Table 1. Thus, in the eight years following the passage of the Act, competitive on-net building penetration has increased a dismal 33 percent in total, or 4 percent annually. At this rate, it would take competitors the better part of the new century just to achieve 10 percent penetration.

deployment, and that the Commission should somehow construe that against the competitors. *See, e.g.*, SBC at 86. That is preposterous. In fact, AT&T – both in this proceeding and in previous proceedings – has provided extremely detailed data on the number of buildings in which it has deployed loops, and even how many circuits of varying capacities AT&T obtains from itself, from the ILECs, and from competitive carriers. *See, e.g.,* AT&T at 41-42 & Fea-Giovannucci Dec. ¶¶ 63-65. Moreover, AT&T and dozens of other competitors also provided detailed data in the state commission proceedings in response to the Bells' claims as to specific buildings. AT&T has been more than forthcoming; SBC simply does not like the answers.[18]

In short, there is no longer any real dispute about the extent to which competitors can deploy their own loop facilities. Only a small, randomly distributed fraction of customer locations are even potentially "suitable for competitive supply." As the Commission previously concluded, a competitor can economically deploy its own loops only to locations that (1) are extremely close to a pre-existing splice point on its metropolitan fiber network and (2) where the competitor has more than 2 DS3s of traffic. In all other situations, competitors have no choice but to use ILEC special access.

The Total Telecommunications Revenues In A Building Are Irrelevant To The Impairment Inquiry. The Bells also assert that competitors can economically build laterals to new locations as long as aggregate *potential* demand at a building is sufficient. *E.g.*, SBC at 85-

[18] SBC cites a statement by AT&T's Chairman that AT&T self-provides 20% of its DS1 equivalents on its own network. SBC at 86 & n.272; Bell Report at III-4. As AT&T has previously explained, however, that simply reflects the fact that AT&T uses its own facilities to provide many of its OCn-level services. One OC3 contains 84 DS1s; thus, while AT&T uses its own facilities to provide service (mostly OCn services) at a small fraction of its overall customer locations, it self-provides a significantly larger percentage of its overall DS1 *equivalents* (20% in 2002). If anything, what is striking is how *few* DS1 equivalents AT&T self-provides, considering the maturity of the high capacity market.

86. This is flatly wrong. As the Commission already found and competitors' sworn testimony confirms, a rational competitor will base its decision whether to construct a loop solely on the *committed* revenues it has from its own customer. *Triennial Review Order* ¶ 303; AT&T, D'Apolito-Stanley ¶ 11. If a competitor could not recover its deployment costs from committed customer revenues from its customer in a building, it would not deploy a loop to serve that customer merely in the hope that it might someday obtain business form other customers in the same building. *See Id.* ¶ 11. Such deployment would be no less speculative than constructing loops to buildings where a competitor had no customers; in either case, the competitor has no sound basis for recovering its investment. *See also* AT&T at 59-60 (customers are often unwilling to roll active circuits); Loop-Transport Coalition at 111 ("Xspedius is aware of the danger of speculative building, and will not engage in new network construction unless it justified by actual customer demand").

The Bells' Unsupported Assertions About The Ease Of Constructing Loops Are Unfounded. Through their unsworn report, the Bells halfheartedly offer a few reasons why competitors could easily construct loops to serve individual locations. These claims are unsupported by any engineering or economic evidence. Indeed, they are belied by the Commission's recognition that there are numerous project-specific reasons why an otherwise profitable facility build – of even more than 2 DS3s – may be stymied. Similarly, the claim is undermined by the Bells' own aggregate data showing the small numbers of buildings served by competitors' loops – *i.e.*, if loop construction were so easy, we would expect to see far more competitor-deployed loops. As Dr. Selwyn notes, the Bells' insistence that competitors can easily fill the "remaining gaps" in the scope of their facilities-based networks is "like describing the Pacific Ocean as a 'gap' between San Francisco and Tokyo." Selwyn Reply Dec. ¶ 4. The

Bells' assertions are incorrect and refuted by the wealth of sworn declarations submitted by competitors.

The Bell Report's brief description of the economics of loop deployment is fundamentally misleading. *See* Bell Report at III-16. First, the report correctly notes that competitors place splice points in their fiber networks to facilitate deployment of "laterals" (*i.e.*, loops); however, the report nowhere comes to grips with the fact that the vast majority of customer locations are either too far away from such splice points or do not have enough traffic to justify the costs of loop construction.[19] The report's further suggestion that laterals cost less than metro fiber rings to deploy is patently false; AT&T's actual business cases confirm that the outside plant cost per foot is essentially the same regardless of the facility being built, because infrastructure costs are the same for virtually any size facility. *See Triennial Review Order* ¶ 320 & n.945; AT&T, D'Apolito-Stanley Dec. ¶ 16; Fea-Giovannucci Dec. ¶¶ 25. The report also claims (citing previous AT&T testimony) that competitors share the costs of construction by engaging in joint builds. The notion that competitors would jointly construct a *loop* into a building to compete for the same customer is absurd. Moreover, as AT&T showed in its comments, AT&T no longer engages in joint builds of any kind because of the extreme difficulties created by such situations. AT&T, Fea-Giovannucci Dec. ¶ 82.

In addition, given that the Bells cannot deny that access to rights of way and to individual buildings pose huge obstacles to any construction, they try to dismiss these obstacles as mere "delays" irrelevant to the impairment analysis. *See, e.g.*, SBC at 91; Verizon at 53-54.

[19] AT&T at 34-38 & D'Apolito-Stanley Dec. ¶¶ 12-24. The Bell Report cites something called "Telegeography MANs 2003" for the proposition that such splice points "may" be as close as 65 feet apart, but in reality they are usually in the range of 2000 feet apart. *Id.*, Fea-Giovannucci Dec. ¶ 23.

Competitors' sworn testimony confirms, however, that building owners continue to deny access to buildings, impose exorbitant costs or delays on competitors, and limit competitors to fiber-to-the-floor arrangements. *See, e.g.*, AT&T, Fea-Giovannucci Dec. ¶¶ 42-45; Giovannucci Reply Dec. ¶¶ 5-12. Neither Verizon nor SBC deny these facts, nor do they deny that, in such circumstances, competitors are often *precluded* (*i.e.*, "impaired") from serving customers, because a customer will not buy service if a carrier cannot deliver in time.[20] As the competitors have shown, this is one among many reasons that even the Commission's previous 2-DS3 capacity threshold is over-predictive of non-impairment. The Bells' only answer is that competitors can use special access. Verizon at 54; SBC at 87-88.

Finally, the Bells again trumpet fixed wireless and cable as alternatives for high capacity loops and transport. SBC at 86-87; Verizon at 51-53; Qwest at 79-80, 82-83; Bell Report at III-19-25. AT&T has thoroughly refuted these claims; the availability of fixed wireless and cable are so insignificant as to be irrelevant to the impairment analysis, especially for enterprise customers. *See* Selwyn Dec. ¶¶ 108-15.

As to fixed wireless, the Bells claims are highly speculative. The Bell Report notes that "[t]he fixed wireless industry was not doing well at the time the *Order* was issued, but it has

[20] Verizon's only contrary evidence is a survey from 2000 indicating that some (but not all) building owners permit either one or sometimes more than one competitor to offer service in their buildings. *See* Verizon at 53 & n.48 (citing Ex Parte of the Real Access Alliance, *Promotion of Competitive Networks in Local Telecommunications Markets, et al.*, (filed in WT Docket No. 99-217 & CC Docket No. 96-98, June 16, 2000)). That survey hardly disproves impairment: clearly, some building owners in the survey do deny entry, which unquestionably constitutes impairment, and the survey even on its face does not contradict the competitors' testimony that building owners impose onerous costs and conditions on entry that do not apply to the Bells and that they usually limit competitors to fiber-to-the-floor arrangements. This study from 2000, whatever its reliability, casts no doubt on the Commission's conclusions in 2003 that such obstacles are significant. *Triennial Review Order* ¶¶ 303-05.

been dramatically revived since." Bell Report at III-20. The "dramatic revival" to which the Bell Report refers is the IEEE industry standard (802.16a), which was recently finalized. However, as the Report notes (but only in a footnote), "[i]nitial vendor tests are scheduled for the third quarter of 2004, and certified equipment is expected in the market by the first half of 2005." *Id.* at III-20, n. 52. With the exception of WilTel, every carrier cited in Table 15, "CLEC Use of Fixed Wireless to Extend Fiber Networks" is cited as "checking out," "looking at," or "looking for" or "working with" or "in trials" to use fixed wireless, with statements couched in terms as "could be a very meaningful breakthrough" or "possibility." *Id.* Table 15. Although the new "WiMax" standard appears promising, it is certainly still in its infancy and, as previous excitement over earlier versions of fixed wireless service have shown, technologies do not always live up to their hype.

Indeed, this is a "real" fact confirmed by the testimony submitted by XO, which states that it invested "nearly $1 billion in acquiring LMDS spectrum at the 28, 31 and 39 GHz frequencies, which in combination potentially covers 95 percent of the population of the 30 largest U.S. cities. We made this investment in the hope and expectation that we eventually will be able to use fixed wireless technology as a local loop substitute … Despite our best efforts, the roll-out was a failure . . . The results of our testing show that . . . at some indeterminate future point, wireless loops likely will be able to function as substitute for more than DS-1s or DS-3 local loops in some situations. However, it is very clear that widespread or commercial deployment of wireless local loops will not occur in the near future. In addition, when it does happen, the wireless local loops solution will only be useful in isolated situations that are conductive to use of the technology." Loop-Transport Coalition, Tirado Dec. ¶¶ 23-35.

Competitors also confirm that cable TV is not a viable alternative to Bell network facilities for reaching enterprise customers. They state that, to their knowledge, no cable television company has ever offered to provide DS-1 level loops to them. *See id.*, Wigger Dec. ¶ 30, Tirado Dec. ¶ 30. Competitive carriers state that there are substantial geographic differences between the build-out plans of most cable companies and competitors' specific needs, and cable networks generally do not reach competitive carriers' customers. *See id.*, Wigger Dec. ¶ 31, Kunde Dec. ¶ 18, Tirado Dec. ¶ 31. Finally, even where cable does exist, it rarely contains the necessary capacity to serve large numbers of business customers with the required telecommunications and internet services at DS-1 and higher speeds, since the design of the network commonly supports only infrequent high-speed bursts to and from subscribers. *See id.*, Wigger Dec. ¶ 30-32, Tirado Dec. ¶ 32.

2. Transport.

AT&T's opening comments contained detailed information, again drawn from AT&T's own actual business cases since the beginning of 2003, which demonstrated that a competitor cannot economically construct its own transport on a given point-to-point route unless it has more than 12 DS3s of traffic on that route, and usually far more, and even then only if there is a limited amount of outside plant required. As with loops, construction is feasible only if the point-to-point distance is very short. Thus, traditional ILEC interoffice transport cannot be economically duplicated because ILEC LSOs are typically several miles apart, and the cost of deploying outside plant would be prohibitively expensive for any competitor. *See* AT&T at 43-44 & Fea-Giovannucci Dec. ¶¶ 16. Other competitors' comments confirm that transport construction is generally uneconomic below the Commission's 12 DS3 capacity threshold. The Bells' evidence does not refute any of these showings.

Competitor-Deployed Transport Is Not a Substitute For ILEC Interoffice Transport. At the center of the Bells' case is their outlandish claims about the nature and purpose of competitor-deployed transport. They simply assume that (1) competitors typically self-provide interoffice transport between their collocations (*i.e.*, between ILEC LSOs); and (2) that all competitors typically interconnect with one another, so that any competitor has access to any other point served by any other competitor. Thus, the Bells claim that competitors do not need ubiquity in their own networks; rather, because of competitors' supposed ability to use all other competitors' networks, the combination of those competitive networks together forms a single, nearly ubiquitous alternative to the incumbent's network. To illustrate this concept, Verizon has filed "spider web" charts that map all competitor collocations in a city, and then draws lines connecting every collocation to every other collocation, as if competitors could avail themselves of competitor fiber to reach any point in this "web." *See* Verizon at 45; SBC at 66; Qwest at 78.

This claim is preposterous, and each step of the Bells' assertions is totally false. AT&T has refuted these claims in detail in its opening comments. *See* AT&T at 45-47 & Fea-Giovannucci Dec. ¶¶ 15-22. The competitors' testimony abundantly confirms AT&T's showing. *See, e.g.*, Loop-Transport Coalition, Duke Dec ¶¶ 16-20 & Wigger Dec. ¶¶ 36-47.

The Bells' Lists of Wholesalers Are Grossly Overstated. With respect to wholesale transport, there is a complete disconnect between the Bells' report and the sworn declarations of competitive carriers. The competitors' declarations make clear that they generally do not offer DS1 or DS3 transport capacity at wholesale. Nonetheless, the Bell Report lists all of these competitors (and many more) as wholesalers. *See* Bell Report at III-14-15 (Table 9). For example, Table 9 of the Bell Report lists AT&T as offering "single channel to OC192" transport

on a wholesale basis; yet AT&T's declarations make clear that AT&T does not offer interoffice DSn-level transport at wholesale. *See* Fea-Giovannucci Dec. ¶ 22. Similarly, Table 9 claims that KMC Telecom offers wholesale transport from "DS-1 to OC-N"; KMC's declaration, however, makes clear that KMC does not have such a wholesale offer, and indeed, would have to reconfigure its network and change its entire business plan to offer such wholesale services. Loop-Transport Coalition, Duke Dec. ¶¶ 16-20. These declarations are consistent with the QSI Analysis's findings that the Commission's wholesale triggers were almost never satisfied, even in the largest states; indeed, the California PUC staff concluded that the Commission's wholesale transport triggers had not been satisfied on a single route in the entire state. *See* California, Staff Report at 9-10.

This is yet another example of the Bell Report's aggressive misreading of websites masquerading as "fact gathering." The Bell Report's table is based entirely on quotes from carrier websites, but in most cases the quotes actually relate to that carrier's general private line or data services, not to a wholesale offer of capacity on competitive interoffice transport between ILEC LSOs. Indeed, the record here makes clear that competitors usually provide the private line and other "wholesale" services described on those websites by using the *ILEC's* facilities (either as UNEs or as special access). That is the reason why any wholesale test the Commission may adopt here must be based on self-certification by the wholesaler, not on a Bell's wild claims that are based on a series of unfounded assumptions. *See* AT&T at 64-65; Selwyn Reply Dec. ¶ 18.

As Dr. Selwyn shows, the Bell Report's Table 2, which purports to list fiber wholesalers, is also grossly over exaggerated. For example, the table includes AboveNet, which states that it has 1.4 million metro fiber miles, but a very significant portion of that fiber is in London,

England, not in the United States at all. The table also includes LightCore, which is a wholly subsidiary of CenturyTel – an ILEC. LightCore apparently owns fiber facilities in CenturyTel's ILEC operating areas that are included in the Bells' counts as well as areas in which the company operates as a competitive carrier. It also includes Northeast Optic Network (NEON), which indicates that, despite its metro fiber ring network, it does not usually provide local loops. *See* Selwyn Reply Dec. ¶ 27.

The Bells' Assertions About The Extent Of Transport Deployment Are Grossly Overstated. As in their *ex parte* filings, the Bells again assert that competitors have deployed thousand of miles of local fiber. SBC at 64. Once again, the Bells rely on data from GeoTel to create maps that allegedly show competitive transport routes. *See, e.g.*, Verizon at 42-44; SBC at 67 & Attachment C; 8/18/04 SBC Letter. AT&T has thoroughly refuted these showings. First, the Bells' maps are irrelevant: the only relevant question is whether competitors can generally deploy fewer than 12 DS3s of capacity on any individual route. The fact that some competitors have been able to deploy transport on some routes at some capacities says nothing about whether they or any other competitor could deploy transport capacity at or below 12 DS3s on those or any other routes. Moreover, as Dr. Selwyn has shown, the GeoTel data on which the Bells rely to construct these maps are unreliable. Selwyn Dec. ¶¶ 60-62.

Indeed, it is clear that the Bells' data are riddled with errors. First, the Bells claim that competitors have deployed 324,000 route miles of fiber as of 2004, although they now admit that (in the small print) that this figure includes "local and long-haul" fiber. *See* Bell Report at I-2, Table 1; III-4, Table 1; SBC at 64. Equally important, Table 1 on page III-4 of the Bell Report is able to identify only 62,042 of the 323,963 total as definitively being "local" in nature—or just 19 percent.

One example of the Bells' overstatement is AGL Networks, which the Bells claim "installs more than 50,000 laterals and 750 miles of conduit per year." *See* Bell Report, III-6 (Table 3). In fact, since AGL only reports 235 route miles of fiber *altogether*, it seems rather unlikely that AGL Networks installs anywhere near 750 fiber route miles annually. AGL notes that "AGL Resources," *not* "AGL Networks" installs these laterals and conduit miles. AGL Resources is the parent company of AGL Networks, but also the parent of Atlanta Gas Light, Chattanooga Gas, Virginia Natural Gas, Georgia Natural Gas and Sequent Energy Management. Despite the Bell Report's claims, it is reasonable to assume that the vast majority of laterals and conduit laid by AGL does not include fiber, but rather is gas infrastructure. Selwyn Reply Dec. ¶ 28.

Similarly, Progress Telecom is one of the utilities that the Bell Report identifies as being a wholesale local fiber provider and with which the Bell Report associates 8,524 route miles of fiber. *See* Bell Report III-6 (Table 3). A network map posted on Progress's website demonstrates, however, that nearly half (43%) of the figure cited is long-haul, inter-city fiber that cannot be used for interoffice transport between ILEC LSOs or high-capacity loops to business customers. And even the 43% figure is likely understated significantly because the inter-city distance calculated is airline mileage (*i.e.*, as the crow flies), which does not represent real-world fiber builds. Two examples highlight the impact of this where the route distance is understated by 18% in one instance and 15% in the other.

A City	B City	Airline Mileage	MapQuest Mileage	Variance
Atlanta (GA)	Tallahassee (FL)	229	271	18%
New York City (NY)	Washington, D.C.	203	233	15%

In both examples the MapQuest mileage generally follows the path depicted on Progress's network map – *i.e.*, along I-75 for the Atlanta-Tallahassee route and along I-95 for the New York to D.C. route.

SBC's Analysis of DS3 Impairment Is Incorrect. SBC's sole argument as to why there is no impairment for DS3 transport borders on the absurd. First, SBC asserts that competitors are not impaired for DS3 UNE loops, because competitors purchase very few DS3 UNE loops. SBC then argues that, if competitors do not need DS3s for the last mile loops, then it follows that competitors do not need DS3s for transport. SBC at 70-71, 73.

Even if the first step in this logic were correct – and it most assuredly is not[21] – non-impairment for DS3 transport does not follow. The Commission properly found that the capacity threshold for transport must be considerably *higher* than the threshold for loops. Unlike loops, the distance between ILEC LSOs is usually several miles, and therefore the outside plant costs of deploying interoffice transport are exponentially higher. Indeed, the comments confirm that deployment of true interoffice transport is rarely if ever economically justified. Therefore, SBC's simplistic claim should be rejected.

3. Entrance Facilities.

Finally, the Bells offer no reason why competitors should not have unbundled access to entrance facilities (up to 12 DS3s). As AT&T demonstrated previously (at 50-52), the

[21] The comments have demonstrated that competitors' small purchases of DS3 UNE loops are not attributable to lack of impairment, but to use restrictions and other stonewalling by the ILECs.

impairment analysis for entrance facilities is exactly the same as that for dedicated transport between ILEC LSOs, and they should therefore be made available on an unbundled basis (and free of use restrictions) where the competitor has insufficient capacity to satisfy the Commission's 12-DS3 traffic threshold for dedicated transport. *See* AT&T, Fea-Giovannucci Dec. ¶ 76. Contrary to the Bells' suggestions (*see, e.g.*, Verizon at 80-81), the Bells have constructed many existing entrance facilities, which are indisputably part of the ILEC network, are used to serve ILEC customers, and are subject to the same entry barriers and impairment analysis as all other transport. AT&T at 51. Moreover, virtually all competitor switches are housed in buildings that the ILECs' ubiquitous networks already reach with their existing transmission infrastructure. In addition, SBC overstates competitors' ability to locate their switches to minimize the costs of constructing entrance facilities. SBC at 70. Even in the best-case scenarios, entrance facility construction requires significant outside plant costs, and as AT&T has shown, outside plant costs can quickly outpace a competitor's ability to recoup those costs as the length of the facilities exceeds only a few hundred feet. AT&T, Fea-Giovannucci Dec. ¶¶ 66-76. Competitor's networks also tend to have fewer switches serving a much broader geographic area than the typical ILEC switch. Therefore, placing a switch close to one ILEC LSO inevitably increases the distance of that switch from other ILEC hubbing points, so that minimizing the cost of one entrance facility inevitably increases the costs (and impairment) of establishing others. Thus, as with all other transport, a competitor is impaired unless it has cost-based access to at least 12 DS3s of capacity for entrance facilities.

III. THE EXISTENCE OF SPECIAL ACCESS SERVICE PROVIDES NO BASIS FOR DENYING ACCESS TO LOOPS AND TRANSPORT AS UNES FOR LANDLINE LOCAL AND LONG DISTANCE SERVICES.

The 1996 Act adopts a cost standard for network element rates for one simple reason: Congress understood that efficient facilities-based competition cannot thrive if competitors

cannot access the ILECs' bottleneck facilities on rates, term and conditions comparable to those the incumbents themselves incur. ALTS at 9-13; AT&T at 101-02. Otherwise, incumbents can use their enormous economies of scale against competitors by pricing their retail services on the basis of their own economic cost while charging competitors excessive rates to use network elements the competitors cannot duplicate.

Although the *USTA II* court struck down the Commission's rule that deemed special access as irrelevant to its impairment determinations on the grounds that it was not sufficiently reasoned, the Court *repeatedly emphasized* that this rule could be readopted if the Commission finds there would be a significant potential for anticompetitive conduct if ILECs could force competitors to substitute special access for cost-based UNEs. The Court specifically identified three separate factors for the Commission to consider on remand, each of which supports continuation of the Commission's prior decision not to exclude consideration of the availability of special access in impairment determinations.

First, the Court, consistent with the decades-old recognition of "the ILECs' incentives to set the tariff price as high as possible," suggested that the Commission examine whether there is a "risk" that the Bells can set special access rates at levels that allow them to foreclose competition. *USTA II*, 359 F.3d at 576. Second, the Court directed the Commission to determine whether special access poses different "opportunities and risks" relative to use of UNEs that competitive carriers are impaired in their ability to offer services in competition with the ILECs. *Id.* at 577. Third, because of the "vagaries of determining when prices gets so high that the 'impairment' threshold has been crossed," the Court directed the Commission to consider whether a rule that allowed ILECs to avoid unbundling by offering a UNE at a tariffed

rate would "raise real administrability issues" that "support a blanket rule treating the availability of tariffed services as irrelevant to impairment." *Id.*

AT&T's opening comments (at 80-134) and the comments of other competitive carriers,[22] clearly show that each of these factors supports re-adoption of the rule that treats special access as irrelevant to impairment determinations. Remarkably, even though they repeatedly emphasize the need for the Commission to follow *USTA II* strictly, the Bells' comments simply ignore all these factors. Instead, their comments offer a hodge-podge of claims about the "steep" discounts available to special access purchasers and the extent to which competitive carriers' special access purchases have grown. As explained below, to the extent the Bells' evidence is actually relevant to the *USTA II* framework, it demonstrates that competition cannot "flourish" (or, indeed survive) if competitive carriers are relegated to special access services.

A. Forcing Competitors To Purchase Above-Cost Special Access Services Creates A Substantial "Risk" That The Bells Will Foreclose Competition By Executing Predatory Price Squeezes.

There is no credible reason to doubt that there is a real "risk of ILEC abuse" if competitors are relegated to special access rather than UNEs to serve enterprise customers. AT&T at 91-101. As a matter of basic economics, such a risk exists because (i) special access constitutes a significant percentage of the overall cost of the service and (ii) special access is priced far above economic cost. Selwyn Dec. ¶¶ 73-75. Indeed, such risks exist even where the ILEC has *no* ability to raise special access rates above current levels, because to the extent its existing prices remain above economic cost, the ILEC can profitably price squeeze by lowering

[22] *See, e.g.*, ALTS at 8-34; Loop-Transport Coalition at 37-69; MCI at 154-72; NuVox at 28-50.

its retail rates. *See LEC Classification Order* ¶ 83; *MCI-WorldCom Merger Order* ¶ 81; *MCI-BT Merger Order* ¶¶ 39-40; *Michigan 271 Order* ¶ 40; *Access Reform Order* ¶ 277.

Many competitors' comments amply demonstrate that the Bells' special access rates – even their "discounted" rates – are priced far above cost-based levels, as reflected in the TELRIC rates set by the state commissions for the same facilities used to proved special access service. *See* Stith Dec., Atts. 1-2.[23] Other competitive carriers, many of which cannot qualify for the Bells' best discounts demonstrated that there is an even greater disparity between the UNE rates set by state commissions and the ILECs' special access rates for comparable functionality. These carriers "commonly must pay well over 100% or more – often 300-400% more – to purchase connections to buildings as DS1 special access as compared with the cost of purchasing DS1 UNEs." Loop-Transport Coalition at 47 (citing testimony); *see also* NuVox at 30-34 & Jennings Dec. ¶ 9; T-Mobile at 21. Indeed, Conversant shows that Verizon's 84-month (7 year) discounted special access rates are about 100% higher than comparable UNE rates. ALTS, Shanahan Dec. ¶ 16. The Bells, however, make no attempt whatsoever to show that even their most highly discounted access rates are cost-based, let alone that their "base" access rates are cost-based.[24]

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[23] Indeed, as Mr. Stith demonstrated, even the ILECs' "price capped" special access rates are above economic costs, because those rates were initially set on the basis of historical costs. *See generally id.*

[24] The exorbitant level of the Bells' special access charges is also revealed by the returns they earn on those services. As Dr. Selwyn shows, the Bells' rate of return on special access services has been *steadily increasing* since they have been granted pricing flexibility. Selwyn Reply Dec. ¶ 73. In fact, recent studies now show that the Bells earn, on average, a 40% return on investment in special access. Loop-Transport Coalition at 41, 46 (citing studies). Verizon responds that this analysis is flawed because the relevant ARMIS accounts include revenues attributable to DSL service. However, even accepting that claim at face value, the Bells' (continued . . .)

The evidence likewise shows that, for a broad array of business services, the cost of special access is the single largest cost incurred in providing the service. According to Covad, loop and transport costs are nearly 50% of its total monthly costs. Covad, Derodeff-Bennet-Richman Dec. ¶ 9. And NuVox shows that last-mile access constitutes a substantial percentage of the costs of its integrated voice-data offer targeted at small and medium businesses. NuVox at 34. Overall, independent analysts have concluded that the cost of last-mile access constitutes a *majority* of the costs of many key business services. UBS, *How Access Charges Determine Winners and Losers in Telecom Services*, at 22 (April 2, 2004) ("In many instances, the special access circuits required to connect the end user to the IXC network represent the majority of the total cost of the circuit. More than 50% of the total cost of a Frame Relay drop or private line circuit is represented by the cost of the last mile that the IXCs must pay to the ILECs.").

In their reply declaration, Messrs. Benway, Lesher and Dionne explain that last-mile access is "the largest operating expense of non-ILEC providers of wireline enterprise services." Benway-Lesher-Dionne Reply Dec. ¶ 5. This is true for AT&T as well. In many instances, last-mile access constitutes a majority of the total costs of an enterprise service. AT&T, Benway-Holleron-King-Lesher-Mullan-Swift Dec. ¶ 22. Overall, access costs are a substantial portion of the costs of those services that rely on special access. Benway-Lesher-Dionne Reply Dec. ¶ 6. This is particularly true for data services such as Frame Relay, private line and Accu-ring that are of increasing importance as demand for traditional voice services declines. *Id.*

(. . . continued)
reported return on investment is still astonishing: increasing from 7.5% in 1996 to 43.69% in 2003. MCI at 159.

Given the enormous price differences between special access and UNEs, the high percentage of costs those facilities represent and the low profit margins earned by competitive carriers on services sold to sophisticated enterprise customers,[25] the effects of forcing competitors to use special access are unmistakable. Moreover, as detailed below, many competitors frankly state that they would be forced out of business if they had to use only special access to provide "last-mile" connectivity to their networks.

The Bells do not – indeed, they cannot – contest any of these basic economic facts. Nonetheless, they advance two reasons why they lack the ability to price squeeze rivals. First, they contend that competitive carriers are vigorously competing with the Bells using special access in local and long distance markets and wireless markets. BellSouth at 37, 63-68; Qwest at 28, 69-71; SBC at 67-69; Verizon at 54-65, 66-74. Second, and relatedly, they contend that this situation is unlikely to change, as "competition" is forcing them to lower their special access rates. SBC at 67-68; Verizon at 63. Neither of these claims withstands the slightest scrutiny – especially given the evidence of actual anticompetitive Bell price squeezes that are occurring in the marketplace today. This evidence shows that the Bells not only have obvious "incentives" to execute price squeezes – but also that they are in fact doing so. Thus, the very anticompetitive activity that Congress feared before adopting the 1996 Act is now a reality.

1. Existing Levels Of "Competition" Using Special Access Do Not Demonstrate Lack of Impairment.

Contrary to the Bells' claims, wireline carriers purchasing special access are *not* thriving. In fact, the record here shows that wireline competitors are not (i) ubiquitously using "special

[25] Margins in the enterprise market are often in the mid to low single digits. Loop-Transport Coalition, Wigger Dec. ¶ 10 (Advanced Telecom earns a 5% margin on its services); AT&T Press Release, *AT&T Announces Second-Quarter 2004 Earnings* (July 22, 2004) (AT&T earns a 2.7% margin on its business services).

access" to offer retail service or (ii) succeeding in the marketplace. Rather, the evidence clearly shows that, to the extent that competitors are using special access, they are subjected to debilitating price squeezes and many are not profitable. To say the least, competition cannot "flourish" under these conditions. *USTA II,* 359 F.3d. at 576. On the other hand, to the extent that wireless competition has thrived using special access, it is because the Bells have much less ability and weaker incentive to undertake price squeezes in that market.

Wireline Competition From Carriers Using Special Access Is Not "Flourishing." Ironically, the Bells have used their adamant *refusals* to provide access to high capacity loops and transport as a reason to deny competitors' access to such UNEs. As AT&T showed in its opening comments, the existing use restrictions, the Bells' failure to perform the necessary network modifications to facilitate conversion of special access circuits to UNEs, and other Bell anticompetitive practices are the reasons that many carriers, including AT&T, have had to forego extensive reliance on EELs to provide telecommunications services to enterprise customers. AT&T at 166-68; *see also* ATX at 9-10; Loop-Transport Coalition at 55-61. The evidence shows, however, that the Bells have sought to exploit their special access market power by "charg[ing] such high rates to . . . wholesale customers that they cannot compete with the [Bells'] retail rate[s]." *Illinois City of Bethany v. FERC*, 670 F.2d 187, 188 n.4 (D.C. Cir. 1981). "This artificial advantage" has allowed the Bells to win customers even where competing carrier are "more efficient provider[s]." *Non-Accounting Safeguards Order* ¶ 12.

As explained in AT&T's comments, AT&T has had to abandon offering customers the full range of local voice and data services that they demand in instances where AT&T has been forced to use special access services. Benway-Holleron-King-Lesher-Mullan-Swift Dec. ¶¶ 98-103. In particular, AT&T has effectively abandoned providing some types of local private line

and Ethernet services. *Id.* ¶¶ 101-03. Critically, in each instance, AT&T has a strong incentive to provide the service if it could do so. *Id.* ¶¶ 98-99. AT&T would not only earn profits for its shareholders, but it would increase the overall utilization of its local network infrastructure, thereby increasing its economies of scale and lowering overall costs. *Id.* ¶ 98. Notwithstanding these strong incentives, AT&T has effectively been forced to restrict its offers for these services, because they are simply uneconomic for AT&T in light of the Bells' special access rates.

In addition, AT&T developed an analysis that compares the cost it incurs for the leased access input component of core enterprise services with the Bells' retail rates for many types of private line and Frame Relay services. As these detailed studies show, competition for these services is simply not possible, because the Bells' special access rates *alone* are higher than their retail rates for many data services that they offer. *Id.* ¶¶ 78-97. This evidence goes well beyond demonstrating the "risk" of abuse if competitive carriers are relegated to special access, such evidence *a fortiori* establishes a price squeeze. *WorldCom, Inc.* v. *FCC*, 308 F.3d 1, 10 (D.C. Cir. 2002) ("After all, classic price squeeze cases have never turned on a finding that competition by the input purchasing firm was absolutely *precluded*.") (emphasis in original).

This analysis was highly conservative. It not only ignored all the other costs a carrier incurs in providing retail services other than special access, but it also assumed that the efficient competitor could obtain the best volume-based discounts available. Benway-Holleron-King-Lesher-Mullan-Swift Dec. ¶ 76. However, many (indeed most) smaller competitors do not have enough demand to qualify for those discounts, *see* Covad, Derodeff-Bennet-Richman Dec. ¶ 45 ("Covad does not require the volume of circuits that would render it eligible for the special access volume discounts typically obtained by larger carriers serving the enterprise market."). In fact, if the "average" DS1 rate touted by SBC were instead used in these calculations, SBC,

Casto Dec. ¶ 15, the magnitude and scope of the price squeezes AT&T documented would substantially increase.

MCI also offers direct evidence of price squeezes. MCI shows that it has had to limit "the geographic scope of its local exchange offerings." MCI at 170. As MCI explains, while the Bells' special access prices are highly distance-sensitive, its retail prices are not. "For that reason, MCI offers business local exchange service only within a limited distance from its network, and similarly competes in the market for special access services only when the customer location is on or close to MCI's own network facilities." *Id.* at 171.

In addition, existing Bell special access rates have prevented MCI from offering services to small business customers. Given the level of Bell DS1 prices, a business must be willing to purchase a significant number of lines before MCI can profitably match the Bells' prevailing retail rates. According to MCI's sworn testimony, existing Bell special access rates make it impossible for MCI to compete for customers that order less than 12 lines of service. *Id.*

In their reply declaration, Messrs. Benway, Lesher, and Dionne also explain that it is not possible for competitive carriers to counter Bell price squeezes by "bundling" services that are most heavily dependent upon special access with services that are less dependent. Benway-Lesher-Dionne Reply Dec. ¶¶ 7-10. Enterprise customers are sophisticated purchasers. To the extent that they can obtain a service in a bundle offered by AT&T at a lower price from another supplier, they will do so. *Id.* ¶ 8 ("[E]nterprise customers routinely split up their communications needs into multiple bid packages, often seeking separate bids for individual services."). In this regard, "customers are increasingly attuned to the in-region advantages that the RBOCs enjoy, and in an increasing number of deals the customer divides its communications among multiple providers so that it can reap the benefits of the access advantage that the RBOCs

enjoy." *Id.* Thus, AT&T must offer competitive prices on *each* of the *components* of a bundled offering in order to get customers to purchase each component. *Id.*

Nor can AT&T "cross-subsidize" services that are currently being price-squeezed with those that are not. *Id.* ¶ 9. Foremost, AT&T is currently only earning a 2.7% operating margin: there is simply no "pot of gold" from which AT&T can cross-subsidize unprofitable services. Further, as noted, special access is a large percentage of the overall costs of its business services unit. *Id.* ¶ 6. This fact means that AT&T is vulnerable to price squeezes for a broad array of services, not just a few, competitively unimportant services. *Id.* ¶ 8. This is not just a prediction of economic theory, but a statement of empirical fact. "AT&T is already seeing the RBOCs using their artificial access advantage to significantly underprice AT&T even on bids to provide multiple, bundled services to very large enterprise customers." *Id.* ¶ 10.

More broadly, to the extent that the Bells are correct that existing levels of competition are attributable to the "availability" of special access, that fact alone completely undercuts the Bells' position. ALTS at 14. As Dr. Selwyn documented, numerous competitive carriers have been forced into bankruptcy or liquidated outright. Selwyn Dec., Att. 2. Indeed, "[t]he market capitalization of publicly traded CLECs has dropped by 95 percent since its highest levels in late 1999, and 'the worth of the industry relative to the RBOCs is even lower than when the [1996 Act] was first passed.'" ALTS at 14 (quoting economic studies)). Notably, the growing list of casualties include carriers that analysts "thought to have done everything right, building out facilities and taking a conservative financial approach with funding mostly from equity rather than debt." Communications Daily (May 19, 2003) (discussing *Allegiance Telecom: The Poster Child for Facilities-based Telecom Competition Folds* (May 15, 2003)). As a result, the capital markets have dried up for most carriers. *Id.* ("The question still stands – how can anyone expect

investors to come up with the money for future facilities-based telecom competition when investments made in even the ones that had the best chance of success have been obliterated?"). On the other hand, the Bells continue to generate enormous profits for their shareholders and have no difficulty in attracting capital.

The financial distress ranges from the so-called "Big 3" to the smallest niche carriers. Prior to the 1996 Act, AT&T was the market leader in providing long distance services to enterprise customers and had a significant base under term contract. With Bells' aggressive entry into the long distance market, however, that customer base is now being steadily eroded. Selwyn Reply Dec. ¶ 44. As shown in AT&T's most recent financial statement, its business services revenues for this quarter are 12.7% below the second quarter of 2003. AT&T Press Release, *AT&T Announces Second-Quarter 2004 Earnings* (July 22, 2004). Long distance voice revenues have decreased by 17.6% and data revenue declined by 10.4%. *Id.* As a result of these declines, AT&T's operating margin has dropped to 2.7%. *Id.* Reflecting these trends, AT&T "[e]arlier this year took a $11.4 billion charge because of the reduced value of its long distance assets." Christopher Stein, *MCI to Take $3.5 Billion Charge in 3rd Quarter*, Washington Post, at E3 (Oct. 19, 2004).

The story is even worse for MCI and Sprint. Selwyn Reply Dec. ¶ 45. MCI, which had the advantage of shedding much of its debt, nonetheless had a $388 million net loss in the first quarter of 2004 and a $71 million net loss in the second quarter of 2004. MCI Press Release, *MCI Announces Second Quarter 2004 Results* (Aug. 5, 2004). These losses are directly attributable to MCI's declining revenues for enterprise voice, data and Internet services. Dramatically underscoring this point, MCI "reported yesterday that it will take a $3.5 billion non-cash charge in the third quarter" to reflect the diminished value of its long distance assets.

Christopher Stein, *MCI to Take $3.5 Billion Charge in 3rd Quarter*, Washington Post, at E3 (Oct. 19, 2004). This is nearly a 30% reduction in MCI's overall value. *Id.* Sprint too is facing declining revenues for all segments of its enterprise business. Sprint Press Release, *Sprint Reports Second Quarter Results* (July 21, 2004). As a result, its long distance operations are consistently reporting operating losses of hundreds of millions of dollars. *Id.*

In addition, even the handful of smaller carriers the Bells hold up as "poster children" for the ability to succeed using special access are actually examples of why competition cannot flourish without UNEs. For example, the Bells tout the fact that Time Warner Telecom "does not rely upon UNEs." Qwest at 70; Verizon at 55. But Time Warner Telecom "lost approximately $66 million during the first half of 2004 on revenues of $324 million." Loop-Transport Coalition at 65; *see also* Selwyn Reply Dec. ¶ 37. This fact explains powerfully why Time Warner Telecom has reversed itself and now argues vigorously that the Commission should retain loop and transport UNEs. Time Warner Telecom at 2-17. Pac-West, which has joined in the comments filed by ALTS supporting the need for continued access to UNEs, apparently also has rethought its decision to forego employing UNEs in its network. *Cf.* Verizon at 56. Another perennial Bell favorite, US LEC, "lost $29 million in 2003 on revenues of $311 million." Loop-Transport Coalition at 65; *see also* Selwyn Reply Dec. ¶¶ 38-39 (describing financial difficulties facing US LEC). And when Verizon says Tele-Pacific has had "impressive growth," Verizon, Nogay Dec. ¶ 22, it simply ignores the fact that this company appears yet to have earned a profit. Selwyn Reply Dec. ¶ 40.[26] Increasing purchases of special access services from such companies are thus evidence that special access is the disease, not the cure.

[26] Presumably this is why Tele-Pacific now contends that the Commission should retain loop and transport as unbundled network elements.

Correlatively, smaller carriers that to date have been able to provide local and long distance services purchasing UNEs have put in detailed evidence showing the impact that "unconverting" from UNEs to special access would have on their finances.[27] Selwyn Reply Dec. ¶¶ 42. The evidence uniformly shows that forcing these carriers to purchase special access instead of UNEs would devastate their ability to compete. For example, Covad's sworn testimony states that "Covad could not profitably provide DS-1 services to business customers if forced to purchase all of its DS-1 loops as special access circuits." Covad, Derodeff-Bennet-Richman Dec. ¶ 45. Because of the large difference between UNE prices and special access prices in the markets NuVox serves, "the result of requiring NuVox to use special access is that NuVox goes from positive to negative EBITDA." *Id.* at 35 & Jennings Dec. ¶ 11. Similarly, Advanced Telecom currently earns an operating margin of less than 5% – a margin that "would be completely wiped out" if it were required to replace UNE loop purchases with special access services. Loop-Transport Coalition, Wigger Dec. ¶ 51.

These companies are *not* outliers. The comments show that carriers of all stripes – voice and data providers, carriers that use DS1 and DS3 level facilities – would be rendered unprofitable if they were forced to replace cost-based UNEs with special access. *See* Loop-

[27] Specifically, the Loop-Transport Coalition – a broad-based coalition of many of the larger competitive carriers in the country – shows that its members "typically use UNEs between 75% and 100% of the time" to "provide local exchange services." Loop-Transport Coalition at 53 (citing affidavits). Similarly, NuVox, another prominent facilities-based provider, provides sworn testimony that 90% of its circuits used to serve small business customers are UNEs. NuVox at 30 & Jennings Dec. ¶ 8. Covad, the nation's largest non-ILEC provider of DSL service, also "almost always relies on UNE DS-1 loops" to provide its services. Covad, Derodeff-Bennet-Richman Dec. ¶ 44. And BellSouth concedes that nearly half of the buildings served by competitive carriers leasing access to its network are served using UNEs. BellSouth at 37. In light of this hard evidence, Verizon's black box estimates of competitors' relative use of special access service simply cannot be credited. *See* Verizon, Verses-Tataille-Jordan-Reney Dec., ¶¶ 51-59.

Transport Coalition, Brassalle Dec. ¶ 14 (Talk America's existing margins for voice service would be "be completely wiped out" if Talk America were "required to replace DS3-UNE transport with Special Access services."); Loop-Transport Coalition, Falvey Dec. ¶ 43 ("If Xspedius were compelled to order all of its DS-1 loop facilities as Special Access, our existing integrated voice and data services offered to small- and medium-business customers would be rendered uneconomic, and our ability to offer service to off-net customers would end."); Declaration of Robert Curtis ¶¶ 37-38 (filed in DC Circuit No. 00-1012, May 24, 2004) (showing that Z-Tel could not profitably offer VoIP to medium-sized businesses using special access).

The evidence presented by individual carriers is confirmed by a more general analysis. A study conducted by Micra estimates that eliminating access to unbundled DS1s alone "would cause CLECs to pay nearly an additional $2 billion per year to the incumbents under current special access prices. This would lead to an increase in costs on average of 25 percent per line, and, in all but two states, competitors would be forced to exist the market because their retail offerings would no longer be competitive." ALTS at 30.

Unable to show that competition on the merits is either economically possible, the Bells retreat to their shopworn claim that existing market share evidence shows that competition is viable using special access. BellSouth at 66-67; Verizon at 67-75. With regard to local services, this claim is absurd on its face. Local telephone markets served by high capacity facilities traditionally have been, and continue to be, dominated by the Bells. *See, e.g.*, IDC, *U.S. ATM Service Forecast and Analysis, 2001 – 2006* (June 2002) at 24 (RBOCs have 96.9% share of local ATM services); *IDC, U.S. Frame Relay Services Forecast and Analysis, 2001-2006* (Apr. 2002) at 25 (RBOCs have 90.3% share of local Frame Relay services); *Frost & Sullivan, U.S.*

Wholesale ATM and Frame Relay Markets (2002) at 37 (RBOCs have 95.4% of combined local ATM/Frame Relay Services Markets).

The situation is no different at the wholesale level. As explained above in Part II, there are hardly any alternative providers of those services at the capacity limits (at retail or wholesale) because self-supply is simply uneconomic. Thus, the Bells unarguably enjoy special access market power over DSn-level services. As independent analysts have concluded, "[r]egional Bell Companies dominate the special access market." Frost & Sullivan, *U.S. Private Line Market, June 2004* at 15.[28]

And if the Bells do not (yet) have a dominant share of long distance enterprise markets, it is only because current share data in these markets do not reflect the current or future competitive situation. The Bells (and GTE) were historically *precluded* by law from providing long distance services. Because IXCs generally did not have their own local networks, above-cost special access – while a drag on the nation's economy – did not distort the competitive playing field. Each IXC had to pay the same rate to access a Bell's local network.

Those conditions have radically changed so that existing static market share data that reflect *prior* competitive conditions can be given no weight. *Ball Mem'l Hosp.* v. *Mutual Hosp. Ins.*, 784 F.2d 1325, 1336 (7th Cir. 1986). Now, the Bells (and GTE, which merged with Verizon) have full authority to participate in the long distance market. And, propelled by their

[28] SBC claims that "competitors have won over 40% of the total wholesale market for special access services in SBC's territory." SBC, Casto Dec. ¶ 11. Notably, SBC does not identify with specificity the study upon which it relies other than to say it was conducted by the Yankee Group in 2003. *Id.* As such, SBC's claims are little more than *ipse dixit*. Further, the data that SBC provides show that vibrant competition is emerging *only at the OCn level* and that SBC remains *dominant* with regard to special access at the DS1 and DS3 level – the capacity thresholds that are relevant here. *Id.*

access charge advantage, the Bells have made unprecedented gains in the short period of time that they have been in the market. AT&T at 131-33. Indeed, Verizon concedes that it has won a third of the customer contracts upon which it bid. Verizon at 69. This is remarkable success given that Verizon only recently entered this space, has no long distance network of its own, and is competing against a number of established carriers with demonstrated ability to provide quality business services.

SBC's claim that it only has generated "incremental" gains of $200 million dollars on its enterprise business sales to date is clearly contrived. SBC, Casto Dec. ¶ 13. In the second quarter alone, SBC announced that it won contracts worth hundreds of millions of dollars.[29] It is thus clear that by "incremental" SBC is eliminating much of the value of these contracts (for example, by subtracting out the value of the special access services that it would provide another carrier that won the business). This sleight-of-hand means that comparing this figure to the total market for enterprise services is simply apples-and-oranges. In addition, to the extent SBC is price squeezing, a customer acquisition may constitute an incremental *loss*, because it could have earned greater profits by selling special access services to an unaffiliated carrier (which it will recoup in the long run).

Existing market share data thus understate Bell market power not only because they just recently entered enterprise markets, but also because large enterprise customers take service under multi-year term contracts. Benway-Holleron-King-Lesher-Mullan-Swift Dec. ¶ 25; *Triennial Review Order* ¶ 128. But once existing contracts expire, there will be no check on their ability to wield that power, in the absence of multiple wholesale options (which are

[29] SBC Investor Briefing (July 22, 2004) (available at http://www.sbc.com/Investor/Financial/Earning_Info/docs/2Q_04_IB_FINAL.pdf).

virtually never available) or unless competitive carriers are able to purchase UNEs where they do not have sufficient scale economies to construct their own facilities.

Accordingly, current market share data are *not* indicative of rivals' ability to flourish and should be disregarded in favor of more probative measures. Here, there is direct structural evidence that carriers relegated to special access are at an enormous *and growing* competitive disadvantage. As explained above, so long as competitive carriers are relegated to above-cost special access, they will have an ever decreasing ability to compete with the Bells. *See ITTA Forbearance Order* ¶ 7 (incumbent LECs "have the ability and incentive to use their bottleneck facilities to engage in cost misallocation, unlawful discrimination, or a price squeeze against rival interexchange carriers"); *LEC Classification Order* ¶ 83 (a local exchange carrier "can profitably raise and sustain prices above competitive levels and thereby exercise market power . . . by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input, such as access to bottleneck facilities, that its rivals need to offer their services"). Wireline enterprise providers' vulnerability to price squeezes is particularly acute given that special access expense accounts for the majority of the costs of many retail enterprise services. Benway-Holleron-King-Lesher-Mullan-Swift Dec. ¶ 22.

If any further proof is needed, the Bells have provided it themselves. Because they know that access costs are such a significant component in the overall cost of retail service, the Bells have bragged to the financial markets about how they can easily leverage their "access cost advantage" to gain in-region businesses. *See* CIBC World Markets, *Key Takeways from CIBC Communications and Technology Food Chain Conference*, at 3-4 (June 9, 2004); *see also* SBC Communications Analysts Meeting, Final Transcript at 14 (Nov. 13, 2003) ("*[W]e believe that we have a cost advantage* over AT&T, MCI and others *because they buy a lot of their local*

access from us and or the other regional Bell companies") (emphasis added). As Verizon's Mr. Babbio puts it bluntly, "[o]ur ability to succeed in the enterprise market" is based on our "big[] advantage over everybody . . . that *we have access to the end user and they don't*." Statement of Lawrence Babbio, Vice Chairman and President, Verizon Fourth Quarter Financial Release Conference Call (Jan. 29, 2003) (emphasis added); *id.* ("*Almost 90% of the circuits that wholesalers get today come through us*, and when you look at the relative cost of providing networks to enterprise customers, for example, *the person that wins is the person that puts the most traffic on their network and in most cases, that's us*.") (emphasis added). Thus, the Bells are not targeting businesses that have substantial out-of-region locations because "profit margins are less attractive" in light of prevailing special access charges. *See also* Jeffry Bartash, *AT&T Is Seen Going It Alone, CBS.MarketWatch.com* (Oct. 9, 2004) (quoting BellSouth CEO Duane Ackerman as stating that "BellSouth finds it more profitable to target business in its Southeastern territory, where it can hook them up directly to the company's network. Outside of its region, profit margins are less attractive.").

Critically, this disadvantage exists even for large enterprise customers. *Cf.* Verizon at 67. While AT&T's local network may "touch" most of the largest companies, AT&T's last-mile facilities reach only a small fraction of the locations where those companies need voice and data services. *See* AT&T, Fea-Giovannucci Dec. ¶¶ 55-76 (documenting extent to which AT&T depends upon the ILECs for last-mile access). That means that AT&T must ordinarily lease last-mile access to provide services to even the largest multi-location enterprise businesses. And so long as Bell access charges remain far above their economic cost, the Bells enjoy an artificial advantage in competing for such customers.

Existing Wireless Competition Says Nothing About The Ability Of Wireline Competition To Flourish Without UNEs. The state of wireless competition in no way supports the elimination of loop and transport UNEs for wireline carriers. The comments show there are key differences between wireline and wireless markets for purposes of evaluating impairment. The Bells have much less ability and incentive to price squeeze rival wireless carriers, because "CMRS carriers do not use ILEC special access services as loop facilities to connect to end user customers." Loop-Transport Coalition at 54. As a result, special access constitutes a much lower percentage of the costs of wireless services than wireline services. ALTS at 16; AT&T at 125-26; Loop-Transport Coalition at 54. And the Bells not only have less ability to foreclose rival CMRS providers, they also have fewer incentives to do so, because of the nature of their ownership interests in the wireless providers. A Bell that attempted to price squeeze another CMRS provider could find itself the victim of that same conduct by the CMRS provider's Bell parent. AT&T at 128; ALTS at 15; Loop-Transport Coalition at 54. Also, because many Bell CMRS operations are joint ventures, the costs of a price squeeze (*i.e.*, reduction of special access profits) are fully borne by the Bell, but the benefits of a price squeeze (*i.e.*, the eventual ability to raise wireless prices) are shared by other parties. ALTS at 15; AT&T at 127.

AT&T provides additional hard evidence documenting the fundamental difference between the amount of special access service that is used in wireless services and wireline services. Special access constitutes only a trivial percentage of wireless carriers' operating cost. Selwyn Dec. ¶ 102. In contrast, as detailed in the Benway-Lesher-Dionne reply declaration, the comparable measure for AT&T is substantially higher. Benway-Lesher-Dionne Reply Dec. ¶ 6. The bottom line is that wireless carriers use special access in only a limited way whereas special

access is AT&T's largest operating expense for the services that are provided using special access. *Id.* ¶ 5.

2. Special Access Rates Have Not Been Lowered At All, Much Less Lowered To Economic Cost.

Given this evidence, the Bells' claim that they have "lowered" special access rates simply does not matter. SBC at 67-68; Verizon at 63. Even if it were true – and it is not – the fact is that vigorous and ubiquitous long distance competition in the enterprise market simply is not viable at current special access charge levels. But an examination of the Bells' own evidence also reveals that the Bells are wrong on the facts. Indeed, when properly analyzed, the Bells' pricing behavior shows they have unconstrained market power. That means that, going forward, the Bells have the ability to *expand* the scope of their prices squeezes because they can raise their special access rates at will.

Preliminarily, the Bells do not even attempt to show that they have actually lowered *any* special access rate. Selwyn Reply Dec. ¶ 59. In particular, they offer no evidence that they actually lowered the price for any particular access service for which they have been granted pricing flexibility. *Id.* Instead – because they in fact have not done so – the Bells throw up various "metrics" that are designed solely to mislead and obfuscate.

First, the Bells contend that the "average DS-1 price" has decreased over the last few years. SBC, Casto Dec. ¶ 15; Verizon, Verses Dec. ¶ 61. But this measure does not remotely show that the Bells have used pricing flexibility to lower rates. The "average" price includes *both* the Bells' special access rates in their "pricing flexibility" MSAs *and* their rates in MSAs subject to price cap regulation. Selwyn Reply Dec. ¶¶ 60, 70. As Dr. Selwyn shows, most of the purported "decline" the Bells cite to is the direct result of price reductions that SBC and Verizon were *required* to make for their price capped special access services over that period. *Id.* ¶¶ 69-

72. The Bells' charts thus prove, if anything, that the Bells' have stiffly increased prices in pricing flexibility areas. *Id.*

Moreover, the Bells' "average" figures treat a mere shift in relative access demand as an actual special access price *decrease*. *See Association of Oil Pipe Lines v. FERC*, 281 F.3d 239, 241-43 (D.C. Cir 2002); *Flying J. v. FERC*, 363 F.3d 495, 497-98 (D.C. Cir. 2004). For example, if an access customer merely shifted demand from a month-to-month plan to an OPP, that would be treated by the "average" cost standard as a rate *decrease* even when the Bells had not in fact lowered any rate at all. Selwyn Reply Dec. ¶¶ 67.[30] Indeed, the Bells' formula proves nothing at all – even if a Bell had *increased* both its month-to-month and OPP rates, a shift in demand from the month-to-month tariffs to the OPPs could result in a price decrease under the Bells' analysis. *Accord AOPL II*, 281 F.3d at 243.[31] Similarly, because the total price of a circuit is mileage-sensitive, if a carrier purchases relatively more "shorter" access circuits, the Bells' "average" price measure also improperly treats this as a price decrease. Selwyn Reply Dec. ¶ 74. And given MCI's evidence that it is being price-squeezed on "long" access circuits, MCI at 171, it is quite likely this error is significant.

Through their affiant Dr. Taylor, the Bells also renew their tired claim that average "revenues per voice-grade line" have decreased since 1996. As Dr. Selwyn explains, Dr. Taylor's calculations are fundamentally misleading. Again, as with SBC's and Verizon's "average" price measure, Dr. Taylor here lumps together special access rates in pricing

[30] The Bells also ignore the additional risks and costs that a competitor faces by making the volume – and lock-in – commitments required by Bell discount plans. *See* Part III.B.

[31] Nor is the Bells' analysis even accurate as to whether "average" special access prices have decreased, because the Bells do not reflect the real economic impact of the OPP's other terms, such as the term and penalty provisions.

flexibility MSAs with those in price cap MSAs. Selwyn Reply Dec. ¶¶ 64, 68-69, 72. Price decreases resulting from price cap regulation obviously shed no light on the Bells' ability to increase prices where they are *not* subject to regulation. *Id.*

The Bells' analysis is also flawed because it ignores the fact that the Bells' effective price per DS0 equivalent circuit varies between different kinds of services. *Id.* ¶ 67, 73. In other words, the decline in revenue per DS0 equivalent line is likely due principally to a changing mix of services. *Id.* Specifically, the Bells' higher capacity services – *i.e.*, DS3 and OCn services – grew at a faster rate over this period. *Id.* Because the Bells' effective price per DS0 equivalent is lower for these higher capacity services, this changing mix of services would manifest itself as a declining "revenue per line" when calculated on a DS0 equivalent basis, even though their rates for such higher capacity services did not decline at all. *Id*. ¶ 73. Indeed, the Commission's price cap rules put DS1 and DS3 is separate "subservice" baskets precisely to avoid these type of distortions. 47 C.F.R. Part 61.

Finally, even if it were true that the Bells' lowered some special access prices, that fact, standing by itself, does not demonstrate they lack market power over special access. *Id.* ¶ 61. In competitive markets, decreases in production costs tend to be passed along to consumers in the form of lower prices. *Id.* Thus, the Bells' purported price decreases must be measured against any decrease in their underlying costs of providing those services. *Id.* ¶¶ 78-86. And even taking the Bells' analysis at face value, it does not remotely satisfy that benchmark.

To quantify the extent to which the Bells' monopoly rents have increased since pricing flexibility, Dr. Selwyn reproduced Dr. Taylor's analysis, but controlling for how average costs decreased over the period studied by Dr. Taylor. *Id.* ¶¶ 81-86. In the case of each regional Bell company, the gap between its special access revenues per line and special access costs per line

increased. *Id.* ¶ 79. There is simply no way to reconcile the Bells' claims that they are facing vigorous special access competition with the ever-widening profit that the Bells' are earning on special access services.

The only way to avoid these problems is to compare rates for the same services over time. *Id.* ¶ 59. That evidence clearly shows that the Bells have, in fact, used pricing flexibility to raise their rates. AT&T's opening comments showed (at 105-06) that the Bells have filed numerous tariff amendments in pricing flexibility areas that uniformly raised their prices for specific special access services. As a result of these increases, the Bells' special access rates in deregulated areas are generally now far above the prices they charge for comparable services in areas where they are subject to price cap regulation. Stith Dec., Atts. 1, 2; Loop-Transport Coalition at 48 & n.151 (citing affidavits); MCI at 158; NuVox at 44. This difference is particularly stark, given that the Bells have generally obtained pricing flexibility in their most urban markets where per-unit costs should be lower, and they obtained pricing flexibility only in areas where the Bells were supposedly subject to competition.

In his accompanying reply declaration, Mr. Stith provides an appropriate "apples-to-apples comparison" that quantifies the magnitude of the Bells' price increases. Mr. Stith provides tables comparing the rates that Verizon and SBC (as well as the BellSouth and Qwest) charged for two representative DS1 and DS3 special access circuits in 2001 and in 2004. Stith Reply Dec., Atts. 1 & 2. Mr. Stith performs this direct rate comparison in both pricing flexibility areas and non-pricing-flexibility areas (*i.e.*, regions subject to price cap regulation). *Id.* As Mr. Stith's data show, only the Bells' rates in price capped areas have declined (and then only to the minimum amount required to comply with the Commission's price cap rules). *Id*. ¶¶ 16, 19. On the other hand, the Bells' rates in pricing flexibility have generally increased or stayed constant.

Id.¶ 17. These increases included rate increases for both month-to-month and OPP rates. *See id.* Atts. 1-2. For example, in its Southern territories, Verizon increased on average the month-to-month rates for a typical 10 mile DS1 circuit 15% and its OPP rates for that same circuit by 9%. *Id.*, Att. 1. Similarly, SWBT raised its DS1 0 mile rates by as much as 19% and its DS3 rates by as much as much as 3%. *Id.*, Att. 2. The Bells price increases are particularly stark when judged against how costs of changed in providing special access services. As Dr. Selwyn shows, there has been a substantial *decrease* in the costs of providing special access, Selwyn Reply Dec. ¶¶ 78-86; thus, simply maintaining rates at 2001 levels is effectively equivalent to a price increase. *See also* Sprint at 36 (documenting Bell special access price increases).

Finally, the Bells' ability to raise special access prices can only be expected to increase. First, there are still a number of markets that are governed by price cap regulation. AT&T at 122. As the Bells gain pricing flexibility in those markets, they will be freed from regulation that has to date forced them to lower their special access prices.

Second, although the limited availability of cost-based UNEs provides only a limited check on the incumbents' special access prices, it does provide some constraint on their ability to fully exploit their special access monopolies. *Accord Access Reform Order* ¶ 280; *LEC Classification Order* ¶ 126. As a matter of logic, eliminating access to UNEs altogether will give the Bells even greater ability to raise special access prices going forward. AT&T's comments provided evidence supporting this basic theory: Bell special access rate increases made after the wake of *USTA II*'s vacatur of the Commission's transport rules. AT&T at 122-23. In its comments, Time Warner Telecom provides complementary evidence. According to Time Warner Telecom, shortly after the release of *USTA II*, SBC proposed special access terms and conditions to Time Warner Telecom that were significantly worse than those it had previously

proposed. Time Warner Telecom at 16. Indeed, SBC suddenly insisted on a host of new "poison pills" that would substantially increase the risks that Time Warner Telecom would incur when purchasing special access. *Id*. at 16-17.

Third, customers are increasingly shifting to data services that are heavily dependent on special access. Benway-Lesher-Dionne Reply Dec. ¶ 6. At the same time, the prices of corporate data services are falling. Selwyn Reply Dec. ¶ 45. Thus, "over time, access is becoming a larger portion of the overall spend and the Bells' cost advantage versus the IXCs will continue to increase." UBS, *Q-Series: Paying to Play*, at 22 (Apr. 2, 2004).

B. Special Access Tariffs "Present Different Opportunities And Risks For The Requesting Carrier Than The Use Of UNEs."

The Bells also do not demonstrate – as they cannot – that special access provides competitive carriers with the same competitive "opportunities" as UNEs. As AT&T explained (at 103-04), in order to compete for enterprise business, a competitive carrier requires last-mile access at reasonable *and stable* rates that will allow it to earn a profit over the life of the customer's contract. Further, competitive carriers need last-mile access that is comparable in quality to what the incumbents offer their retail customers. Just as enterprise customers demand the lowest possible prices, they also demand high quality. Special access is inferior to UNEs in both respects.

UNEs Are Far Superior To Special Access With Regard To Key Rate And Non-rate Terms. UNE rates are set on the basis of a state regulatory commission's determination of an ILEC's long run incremental costs. In contrast, special access rates are well-above any reasonable measure of economic cost. As explained above, this is not only true of the Bells' month-to-month special access rates, but also the "discounted" rates contained in the OPPs the Bells tout.

Likewise, UNE rates are generally fixed for several years, and a TELRIC rate can only be increased if the ILEC can prove to an independent state regulator that its costs have in fact increased. This provides competitive carriers with reasonable rate stability. Special access rates, however, have largely been deregulated, and the Bells can increase them at any time on one day's notice. And, as shown above, the Bells face virtually no wholesale competition for the elements that may be purchased as UNEs; thus, they have been able to take advantage of pricing flexibility to raise special access rates even while their costs have declined. Time Warner Telecom at 17. In this way, the Bells have been able to raise special access rates even for customers purchasing special access out of "discounted" OPP tariffs, for those tariffs often tie the discount to the base month-to-month rate. *Id.*

In contrast, UNEs are available on month-to-month terms. *See* NuVox at 49. This means that competitive carriers can use UNEs to serve as a "bridge" mechanism that enable competitive carriers "to enter the market gradually, building a customer base up to the level where its own investment would be profitable." *USTA I*, 290 F.3d at 424; *id.* ("the more widespread the availability of elements that can be more efficiently provided by the incumbent . . . the quicker competitors will set about providing the other elements"). Similarly, when a carrier leases UNEs from the ILEC, it has the ability to shift traffic to third parties where alternatives develop without incurring shortfall or termination penalties. *See* NuVox at 49.

To get the Bells' best rates, however, carriers must (i) agree to make either specific circuit commitments or otherwise commit significant historic demand to the Bells for lengthy terms *and* (ii) agree to lock-up traffic on the Bells' network for a lengthy term pursuant to the Bells' "overlay" tariffs. AT&T, Benway-Holleron-King-Lesher-Mullan-Swift Dec. ¶¶ 53-61; Loop-Transport Coalition at 61-63; McLeod at 38; NuVox at 45-49; Time Warner Telecom at

14-16. While SBC tries to cast these restrictions as "ordinary" term and volume conditions, SBC, Casto Dec. ¶¶ 17-24, they are nothing of the sort. The conditions contained in SBC's OPPs – as well as similar conditions contained in the OPPs of the other Bells – are clearly intended to inhibit rival carriers from *either* deploying their own facilities *or* diverting demand to alternative providers, and they enormously increase rival carriers' risk in providing competing service against SBC and the other Bells. Time Warner Telecom at 14-16. The Bells' OPPs are thus analogous to tying arrangements and requirements contracts that have been condemned under the antitrust laws.[32]

SBC's tariffs starkly illustrate the anticompetitive nature of the OPPs. For example, in the Ameritech region, the steepest discounts on DS1 facilities are available only to carriers that agree to commit DS1 traffic to Ameritech for five years. Ameritech FCC Tariff No. 2, § 7.4.10(A). However, the discounts apply *only* to specifically identified DS1's that are committed to Ameritech on a circuit-by-circuit basis. *Id.* Thus, if the subscriber has any reduction in DS1 demand for the committed circuits, – even if it retains the same overall volumes – it triggers the penalty provisions of Ameritech's tariffs. *Id.* § 7.4.10(C).

Alternatively, Ameritech's discount commitment plan (a lesser-discounted alternative to the circuit-specific plan) contains a "lock-up" provision that requires a carrier to commit 90% of

[32] *See, e.g.*, *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 6 (1958) (tying arrangements are unlawful when they "deny competitors free access to the market for the tied product, not because the party imposing the tying requirement has a better product or lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products"); *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961) (contracts that requires customers to purchase most or all of their requirements for a product or service from a monopolist are often found to be anticompetitive when a significant portion of the market (generally in excess of 30-40%) is affected or "locked up" by the contract).

its historic revenues with Ameritech in order to receive the discounts available under the plan. *Id.* § 7.4.13(D). Carriers that fall below the 90% threshold are subject to substantial shortfall penalties. *Id.* SBC's OPP *also* contains a "ratchet" provision designed to ensure that carriers never develop significant "head room" under the tariff that could be diverted to competitive facilities. *Id.* In particular, if a carrier's revenues increase substantially during the term, it must "renormalize" its commitment so that its higher level of usage establishes the new commitment floor. *Id.*

In addition to agreeing to the above-discussed term conditions, to get SBC's best (but still bloated) special access rates, a carrier must also subscribe to and meet the conditions contained in the "overlay" MVP tariff. A carrier can obtain the discounts under the MVP *only* if it agrees to lock-up 95% of its historical demand with SBC. *See, e.g.*, Ameritech FCC Tariff No. 2, § 19.3(D). Further, SBC's MVP contains another independent condition that expressly limits a subscriber's ability to purchase UNEs. Thus, to satisfy the MVP, a subscriber must *both* lock-up 95% of its special access demand with SBC *and* limit its overall purchase of UNEs to less than 5% of its special access purchases.

SBC's attempts to explain away these onerous terms are unavailing. According to SBC, the "95% access ratio provision does not require customers to purchase 95% of their high capacity circuits from SBC. Under certain discount plans, that provision simply requires a carrier customer to purchase 95% of the high capacity circuits it buys from SBC as special access services, rather than UNEs" and "[s]uch customers remain free to buy" from alternative providers. SBC, Casto Dec. ¶ 22. This is semantic sleight-of-hand. While SBC is correct that the 95% ratio requirement of the MVP standing alone does not require a carrier customer to lock-up its traffic with SBC, what SBC ignores is that, as noted, *another* provisions of the MVP

directly imposes this requirement. *See* Ameritech FCC Tariff No. 2, § 19.3(D). To satisfy the MVP, a carrier customer must agree both to commit 95% of its historic demand to SBC *and* limit its purchase of UNEs to no more than 5% of its total purchases from SBC. SBC also ignores the express requirements of the term plans. As explained, these plans either provide discounts *only* to specifically identified DS1's that are committed to Ameritech on a circuit-by-circuit basis, Ameritech FCC Tariff No. 2, § 7.4.10(A), or where a carrier has committed 90% of its historic revenues to SBC, *id.* § 7.4.13(D).

SBC plays the same game when it claims that "[n]one of [its] volume discount plans contain provisions that preclude a customer from purchasing new special access circuits from other suppliers." SBC, Casto Dec. ¶ 19. Again, to get SBC's best rates, a carrier must not only subscribe to a "volume discount plan" such as the MVP, but also to a term plan, such as that contained in § 7.4.10(A) of Ameritech FCC Tariff No. 2. A subscriber to that tariff obtains a discount only for the individual circuits it commits to SBC.

Further, "lock-up" provisions contained in the MVP and other SBC term tariffs have the direct effect of preventing customer carriers from shifting traffic to alternative providers. As AT&T explained in its opening comments (at 151-52), a carrier that subscribes to the MVP must agree to provide 95% of its historic traffic levels to the Bell. Similarly, under § 7.4.13(D) of Ameritech FCC Tariff No. 2, a subscriber must maintain 90% of its historic traffic levels with SBC – and to the extent that it experiences real growth over the term, the 90% floor is reset. Even when competitive alternatives exist (possibly even on the carrier's own facilities), it generally cannot use them without risking the severe penalties triggered by failure to meet the

minimum traffic levels the OPPs require.[33] Indeed, many carriers (but not the Bells' long distance affiliates) are experiencing substantial declines in their retail services, due largely to fierce retail competition coming from the Bells themselves. Thus, the lock-up provisions prevent them from sending any significant amount of incremental traffic over their own facilities, or those of alternative wholesalers.

SBC notes that one carrier has moved circuits off of SBC's network, despite the lock-up conditions in its tariffs. SBC, Casto Dec. ¶ 20. Of course, there may be isolated instances in which a carrier has experienced substantial growth in demand over the five-year term of the MVP, providing it with sufficient headroom to shift some traffic to bypass facilities where they exist. But the existence of one (or even a few) such carriers does not disprove that the overall effect of the lock-up requirement is to prevent carriers generally from shifting demand to competitive networks. This is particularly true given that many established competitive carriers are seeing declining demand as the Bells have aggressively entered the long distance market. Indeed, the fact that SBC could only identify a single carrier that has escaped the clutches of the lock-up is strong evidence that this requirement is actually having its intended effect: to constrain competitive facilities deployment.

Unable to show that its OPP tariffs do not require customers to lock-up their traffic, SBC contends that the anticompetitive nature of these plans can be ignored because participation in

[33] The competitive constraints imposed by the lock-up requirement arise when the Bells' access wholesale customers are forced to choose between keeping their service demand on the Bells' networks or diverting it to support their own facilities deployment or purchases from non-Bell suppliers. Where that choice arises, the shortfall liability provisions tied into the lock-up commitment ensure that the Bells – rather than any competitor – will serve the locked-up demand.

them is "optional." SBC, Casto ¶ 18. This is nonsense. Not even the Bells claim that competition is viable under their sky-high month-to-month rates (which are in fact the real alternative to UNEs in terms of comparable risks). Thus, failure to purchase the majority of its special access needs under the OPPs would put a carrier at such a huge cost disadvantage that it would have no meaningful ability to compete in the marketplace. And that is why SBC's own evidence shows that the majority of customers have agreed to knuckle under to the conditions imposed in the OPPs. *Id.* ¶ 8.[34]

Because of these terms, SBC's access service is simply not "available" in the way *USTA II* requires in order to be considered a UNE substitute. As the D.C. Circuit recognized, the impairment analysis must be conducted on the basis of relevant markets with similar characteristics. *USTA II*, 359 F.3d at 575. Moreover, the Commission cannot infer impairment (or lack of impairment) from the extent of competition in markets with very different characteristics.[35] But to get SBC's best prices – *i.e.*, the ones that SBC claims enable competition – a subscriber must be willing to lock up virtually *all* of its traffic and forgo *both* self-deployment *and* third party supply. Thus, even in those limited instances where one could imagine a competitive carrier might be able to use special access in lieu of the limited facilities that may be available as UNEs, that carrier can only obtain special access at a lower (but still exorbitant) price by agreeing to *give up purchasing UNEs*, and *also* the opportunity to self-

[34] For these reasons, and the reasons stated in AT&T's opening comments (at 149-69), the Commission should declare the lock-up provisions of the Bells' OPPs unlawful, and it should eliminate the liability provisions that lend to their anticompetitive effect.

[35] For example, the Commission has recognized that the existence of competitive OCn facilities at a building says nothing about another competitor's ability to deploy DSn-level facilities at the same location. *Triennial Review Order* ¶ 376.

deploy facilities or use a wholesale alternative where special access is patently inadequate to support competitive entry. AT&T, Benway-Holleron-King-Lesher-Mullan-Swift Dec. ¶ 59.

UNEs Provide Far Superior Quality To Special Access. The Bells also say nothing at all about special access quality, and with good reason. UNEs are subject to state performance measures and regulatory oversight. Sprint at 37. To fulfill the requirements of §§ 251 and 271, state commissions required the Bells to adopt performance measures designed to detect and prevent discriminatory UNE provisioning. *See, e.g.*, *Nevada 271 Order* ¶¶ 50-51. And in all its § 271 orders, the Commission ensured that the applicant was subject to a performance measurement and enforcement plan. AT&T, Benway-Holleron-King-Lesher-Mullan-Swift Dec. ¶ 52. But there is no comparable regulation of special access provisioning quality. *Id.* ¶¶ 42-51. Although the Commission opened a proceeding on this subject several years ago, recognizing the critical need to "expeditiously" "address[] special access performance metrics" in light of its decision to eliminate § 272 OI&M safeguards and allow the other safeguards to "sunset," *OI&M Order* ¶ 24, it has taken no action.

The Commission's inaction has freed the Bells to act on their incentives to provide AT&T and other rivals with patently inferior special access service quality compared to the service they provide to themselves and their retail customers. AT&T and other carriers have provided both the Commission and state regulators with detailed data showing that the Bells (i) often do not provide firm order confirmations on a timely basis, (ii) frequently miss installation commitments and (iii) take too long to repair or restore problem or trouble circuits to normal operating levels and often compromise customer service. AT&T, Benway-Holleron-King-Lesher-Mullan-Swift Dec. ¶ 48. The evidence further shows that the Bells provide

competitive carriers substantially worse performance than they provide their own retail affiliates. *Id.*

The evidence also makes clear that the Bells' poor provisioning is intentional, not the result of simple neglect. AT&T quite often must wait weeks – or months – to get a response to an order for special access service. *Id.* ¶ 50. In many instances, when AT&T's order has been delayed in this manner, it has learned from the customer that the Bell approached it directly and offered to provide the necessary service, often in a shorter time. *Id.* Despite AT&T's best efforts, these anticompetitive practices continue to this day. *Id.*; *see also* Comments of AT&T, at 3 (filed in EB Docket No. 03-199, March 26, 2004) (discussing SBC's Second Biennial Audit Report, which showed that SBC provides competitive carriers with "poorer installation service for DS0 facilities, poorer FOC performance for DSO, DS1 and DS3 service, and poorer repair performance for DS0 and DS1 service" that what it provides its own affiliates).

C. It Would Be Administratively Impossible For The Commission Adequately To Reflect The Impact Of Above-Cost Special Access Pricing In Its Impairment Analysis.

Even if the Bells could demonstrate that they were not executing price squeezes today, that is simply irrelevant to whether they can do so in the future. There is no question as to the Bells' incentives in this regard, and so long as access remains above economic cost, they have the undeniable ability to price squeeze rivals. Indeed, even if there were regulatory constraints that prevented the Bells from raising prices further (which there generally are not), the Bells can always achieve a price squeeze by lowering *retail* rates.

History provides a powerful example of the Bells' ability to change their rate structures overnight from those that allow competition to exist to those that foreclose competition altogether. AT&T, Lieberman-Panerali Dec. ¶¶ 7-19. As AT&T demonstrated, SBC overnight lowered its residential rates from levels that allowed competition to levels that did not. Because

of the bloated terminating access charges that AT&T must pay but that SBC does not, AT&T simply could not match the rates that SBC could profitably offer. *Id.* Once SBC implemented this new pricing strategy, it quickly became the dominant provider of long distance services in its territories, whereas AT&T – which had previously held the largest share of the residential long distance market in SBC territories before this change in SBC's pricing strategy – has now ceased marketing residential long distance services.

Thus, in any regime that allows special access to be considered as a potential substitute for UNEs, the Commission would have to constantly monitor the Bells' activity to ensure that they were not acting on their incentives to price squeeze. The Bells' comments, however, make no attempt to show that the regime they advocate is workable. That is because, as AT&T and the other commenters show, it clearly is not. There is simply no way for the Commission to keep up with the myriad ways in which the Bells can price squeeze their rivals.

At a minimum, the Commission would be required to determine (and to monitor) not only (i) the special access rates incumbents unilaterally impose in the future and the quality of their tariffed services, but also (ii) the retail rates that they will charge each of its customers for the numerous telecommunications services available to end users, and (iii) the retail-wholesale margin required to cover the other costs that efficient carriers would incur in providing finished services to retail customers. AT&T, Selwyn Dec. ¶¶ 80-98. This is simply not possible to do on a national – and industry-wide – basis. In order to do so, the Commission would be required to examine hundreds of federal and state tariffs and ILEC retail pricing manuals – and every rate change to any of them. *Id.* ¶¶ 90-98. And in many instances, the Bells' retail rates for enterprise services are not even available because they not publicly filed. Moreover, the Commission would have to make these calculations in "real time" so as to ensure competitive carriers were

granted access to cost-based UNEs in order to compete for business that they could not otherwise win because of high special access rates, or low retail rates, or any combination of the two. *Id.* ¶ 98.

The difficulties of making such assessments could not possibly be resolved by permitting competitive carriers to file complaints seeking after-the-fact-damages. *Id.* The informational demands attendant to price squeeze determinations would place a substantial burden on competitive carriers, and many competitive carriers simply lack the resources to pursue such claims. And critically, data supporting such claims is often unavailable because the Bells' retail rates for enterprise services are often unpublished. Thus, competitive carriers would often lack even the ability to determine whether the Bell's retail price was one that it could have profitably matched given the access charges it was paying. Finally, and most importantly, the purpose of the 1996 Act is to create a regulatory structure that enables competition – not merely to create after-the-fact causes of action for price squeezes that were *already* illegal under pre-existing antitrust laws. Indeed, by definition, under such a regime, a competitive carrier would be denied access to a UNE where impairment exists and where it has lost the opportunity to compete. There is thus an overwhelming issue of administrability that independently requires treating tariffed special access services as irrelevant to impairment determinations.

IV. "USE RESTRICTIONS" ARE UNLAWFUL.

The Commission's use restrictions are manifestly anticompetitive and should be eliminated. In their current form, the Commission's "service eligibility" criteria preclude competitive carriers from obtaining cost-based EELs not only for long distance services, but also for many local services. The result is to foreclose competition for these services and unlawfully preserve the Bells' monopoly rents, because competitors are clearly impaired without cost-based access to those loop-transport facilities.

Ironically, in their comments, the Bells ask the Commission to "fix" the service eligibility criteria. SBC at 97; *see also* BellSouth at 69. The Bells' cure would only exacerbate the anticompetitive nature of those criteria. The Commission cannot legitimately enhance the Bells' artificial access cost advantage even further; instead, the record is now unmistakably clear that it must eliminate the service eligibility criteria altogether. At a minimum, if the Commission decides (unlawfully) to retain these discriminatory restrictions, it must at least modify them in the manner proposed by AT&T to eliminate the "imperfect[ions]" identified by the D.C. Circuit. *See USTA II*, 359 F.3d at 592-93.

As an initial matter, even "perfect" service eligibility criteria cannot be maintained in the wake of *USTA II*. The *Triennial Review Order* justified these restrictions on the sole ground that long distance services do not "qualify" for UNEs, but *USTA II* squarely rejected and reversed that decision. The Court held that the eligibility restrictions *must* be eliminated unless the Commission finds that competitive carriers' ability to offer long distance service will not be "impaired" if they are denied access to UNEs. 359 F.3d at 592. But as described above, and in AT&T's opening comments (at 136-41), it is impossible to make any such finding now that Bells have obtained § 271 authority and have begun providing long distance services to enterprise customers nationwide. It is simply not economically feasible for any competitive carrier to economically replicate local loops (with 2 or fewer DS3s of capacity) or dedicated transport (with 12 or fewer DS3s of capacity). This is true whether the competitive carrier would use those facilities to provide only long distance services or all types of retail services. *See* AT&T at 138-39; MCI at 172-73.

Thus, use restrictions directly tilt the competitive playing field. The Bells are not affected by the such restrictions: they can obtain last-mile access for their long distance

customers at economic cost. In contrast, if competitive carriers are denied EELs, they have no choice but to serve their long distance customers by purchasing high-priced and above-cost special access services from their principal competitor. That, in turn, renders them highly vulnerable to Bell price squeezes – the exact result that Congress sought to prevent when it required the Bells to provide cost-based access to their local networks as a condition of obtaining long distance authority. *See supra* Part III. Moreover, as explained below, the current use restrictions, much less the new ones the Bells seek to impose, prevent competitive carriers from using EELs to provide many local services, and thus have the direct effect of foreclosing competition in those markets as well.

The Bells' proposed use restrictions are thus a regulation in search of a problem. Given the irrefutable evidence of impairment at the low capacity levels for which loops and transport would be available as UNEs, there are simply no impermissible "uses" for EELs. *See* ATX at 43; MCI at 172. However, to the extent the Commission attempts to ignore the evidence of impairment and allow *any* discriminatory use restrictions to continue, adopting the Bells' proposed criteria would constitute arbitrary agency action.[36] That is because the problem with the Commission's current service eligibility criteria is not, as the Bells claim, that they allow

[36] The Bells ask that the service eligibility criteria they propose also be applied to stand-alone loops, as well as EELs. SBC at 96. The Commission appropriately rejected this request in the *Triennial Review Order* on the grounds that it "would be a *vastly over-inclusive solution* in search of a very narrow, speculative problem." *Triennial Review Order* ¶ 592 n.1824 (emphasis added); *see also* Loop-Transport Coalition at 120-21 (describing the "unnecessary implementation and compliance costs" caused by the Commission's service eligibility criteria). This is particularly true in light of the fact, as discussed below, that both the Commission's existing service eligibility criteria *and* those the Bells proposed here would prohibit competitive carriers from obtaining loops as UNEs even when are using them to offer local service. The Bells do not even address the Commission's findings in the *Triennial Review Order*, let alone offer evidence of any "abuses" by competitive carriers that could only be corrected by the severe additional criteria they propose.

requesting carriers to obtain essentially unfettered access to EELs to provide only non-local services, *see* SBC at 95; BellSouth at 69; rather, it is because they irrationally prevent competitive carriers from obtaining EELs, even when they are indisputably offering local services. The Bells' proposals would make this problem even worse.

As AT&T explained in its opening comments (at 142-45), the existing service eligibility criteria are overbroad in three important respects. First, they prevent competitive carriers from obtaining EELs to provide local private line services, even though such services are "local" telecommunications services. Specifically, the criteria require that a competitive carrier have a minimum number of "interconnection trunks" in a LATA and that the carrier provide service using a Class 5 switch. Local private line services directly connect customer locations, and thus do not require traffic to be switched or exchanged between the competitive carrier and the ILEC.

Second, the service eligibility criteria also prevent competitive carriers from obtaining EELs to provide many types of local voice services. AT&T offers a service called AT&T Digital Link, which provides local voice service to enterprise customers using its legacy interexchange switches. Such services are not necessarily served by a "§ 251(c)(6) collocation," and they do not typically include a 911 capability because of the technical limitations of those switches. The Commission's 911 requirement also effectively requires a competitive carrier to provide local *outbound* voice services. As a result, the current criteria exclude competitive local *inbound* voice services, which are typically provisioned without 911 capability. Thus, the existing restrictions preclude competitive carriers from using EELs to provision these local voice services. Worse yet, the 911 requirement also excludes a vast array of local data services.

Third, the Commission's current restrictions deny EELs to carriers that would provide wholesale local access, including access provided to carriers that offer local voice service.

Wholesale access providers typically do not have local numbers assigned to their circuits and do not provide 911 functionality. Moreover, it is unlikely that they would provide such wholesale services using local voice switches or local interconnection trunks, and they do not have to be certificated to provide local voice service.

Accordingly, to the extent the Commission (unlawfully) retains its service eligibility criteria, it must at least adopt the more narrowly tailored rules AT&T identified in its initial comments. *See* AT&T at 145-49. AT&T's alternative criteria are both easily administered and would still prevent IXCs from using EELs where they have not sought to build out a local network. Thus, they would provide carriers with the incentive to build out their local networks where feasible.

On the other hand, the Bells' claim that the current use restrictions give IXCs virtually unrestricted access to EELs is a contrivance. Fundamentally, the Bells overlook the fact that a requesting carrier must satisfy *all* of the eligibility criteria, on a circuit-by-circuit basis, in order to obtain an EEL. Thus, while it may be true that each criterion, if examined in *isolation*, could theoretically be met in some instances even if the carrier did not provide local service (*see* BellSouth at 69; SBC at 95-98), it is virtually impossible to satisfy *all* of the criteria without providing local voice service. No rational carrier would ever invest the enormous resources necessary to re-configure its network to meet those criteria – *i.e.*, obtaining authorization to provide local voice service, obtaining local numbers and E911 capabilities, establishing costly collocation arrangements, establishing interconnection trunks carrying local voice traffic, and deploying switches configured to provide local voice service – if it were not actually providing a significant amount of local voice service. As the Commission correctly found, "the cost of taking the steps necessary to meet these criteria – especially collocation and network re-

configuration – outweighs the benefits of lowering that carrier's special access rate to a UNE rate." *Triennial Review Order* ¶ 600.[37]

In any event, the Bells vastly overstate the extent to which the individual criteria would permit a non-local provider to obtain access to EELs even in isolation. For example, the Bells single out the interconnection trunk criterion as meaningless, but this attack is misguided. *See* SBC at 97-98. The Commission's rule requires that, for every 24 DS1 EELs or the equivalent, the requesting carrier must maintain at least one active DS1 interconnection trunk for the exchange of local traffic. As the Commission explained, the purpose of the 24-to-1 ratio is to ensure that "one active DS1 local service interconnection trunk can serve 24 DS1 EELs that have 5 local voice channels on each EEL." *Triennial Review Order* ¶ 608. Notably, this 24-to-1 criterion was proposed by *SBC*; the Commission relied in part on a letter, filed by SBC and others, in which SBC stated that "the Commission could reasonably conclude that, in its expert judgment, the purchase and use of proportional and bona fide local interconnection capacity for every DS1 EEL [*i.e.*, the 24-to-1 ratio] (1) demonstrates a carrier's commitment to facilities-based entry into the *local exchange* market in the relevant LATA and (2) indicates a reasonable

[37] Notably, the fact that requesting carriers can use EELs to provide long distance service flows from the Commission's independent holding – not challenged by the Bells in *USTA II* – that "once a requesting carrier has obtained access to a UNE to provide a qualifying service, the carrier may use that UNE to provide *any* additional services, including non-qualifying telecommunications and information services." *See Triennial Review Order* ¶ 143 (emphasis added). The Commission correctly found that permitting full of use of UNEs is critical to competition, because the Bells increasingly offer integrated packages of services, and "[l]imiting competitive LECs' use of UNEs to qualifying services only would likely affect their ability to meaningfully compete against incumbent LECs." *Id.* ¶ 146. Similarly, such limitations would "force requesting carriers to either continue to provide services on a stand-alone basis, contrary to the market trend, or *even more perversely*, to provide a package of service over duplicative networks," which would "effectively *preclude* a competitor's ability to compete in the market." *Id.* (emphasis added)

likelihood that a significant amount of local traffic is carried on given EEL facilities."[38] Thus, the problem is not that long distance carriers can easily circumvent this criteria, but as shown above, that it *excludes* many types of *local* traffic such as private line service (not to mention excluding competitive carriers from obtaining EELs to offer long distance services where impairment exists).[39]

In this regard, the Bells' proposal to require a 5-to-1 ratio for interconnection trunks would make a bad situation even worse. SBC at 97-98. All this would do is arbitrarily raise the amount of local traffic that a carrier would need to provide in order to obtain an EEL. If the Commission (unlawfully) decides to allow use restrictions, is should, at a minimum, allow carriers to obtain an EEL so long as they are providing *any* local service, not the amount or type of service the Bells decree is sufficient.

Similarly, the current requirements state that each EEL must terminate in a collocation governed by § 251(c)(6). *Triennial Review Order* ¶ 604. However, special access providers typically provide dedicated connections from end-user premises "directly to their long distance networks and thereby bypass" the local switch. Accordingly, as the Commission found, collocations are "traditionally not used by interexchange carriers" and "provide[] an easily verifiable test that the circuit terminating at the collocation arrangement carries local traffic." *Id.* ¶ 604. Indeed, AT&T submitted evidence that 75% of its special access circuits terminated at its long-distance network, not at a § 251(c)(6) collocation, and thus would not qualify for

[38] *See Triennial Review Order* ¶ 608 n.1851 (quoting 2/7/03 SBC Letter at 4 (mis-cited in the order as 2/4/03)) (emphasis in original).

[39] The service eligibility criteria as a whole are drawn largely from SBC's compromise proposal submitted in the 2/7/03 SBC Letter, and indeed, the Commission (inappropriately) added more requirements than SBC suggested in the final eligibility criteria, including the local switch and E911 criteria. *See Triennial Order* ¶ 596 & n.1832.

conversion to EELs. *Id.* ¶ 604 n.1841.[40] Again, as shown above, the problem is *not* that the current restrictions give long-distance carriers blanket access to EELs, as SBC contends (at 97), but that the collocation requirement *excludes* indisputably local services such as local private line.

Alternatively, the Bells urge the Commission to turn back the clock and re-adopt the previous safe harbors (or something like them), which relied on certifications that a specific amount of local traffic would actually be carried on each EEL. *See* BellSouth at 68-70; SBC at 98.[41] After three years of experience with the safe harbors, however, the Commission correctly found that such requirements had proven unworkable in practice. *See Triennial Review Order* ¶ 614. Indeed, many competitive carriers submitted evidence that they "lack[ed] sufficient information to make the necessary certification at the time the EEL is requested, and have no feasible way to obtain the necessary information going forward to ensure continued compliance." *Id.* ¶ 614 & n.1873. The Commission also found that certification of local voice traffic would be "antithetical to the Act's goals of encouraging the provision of new technologies and advanced

[40] The Bells cite Paragraph 436 of the *Triennial Review Order* as suggesting that interexchange carriers have nearly ubiquitous collocation arrangements, SBC at 97, but that is wrong. The Commission there merely found that competitive carriers had deployed substantial number of local switches. At the same time, the Bells ignore Paragraph 604 of the *Triennial Review Order*, which expressly rejected this claim. *See Triennial Review Order* ¶ 604 & n.1841; *see also id.* ¶ 371 (describing the substantial costs and delays involved in establishing collocated networks).

[41] The Bells also ask that they be allowed to re-adopt their prior practice of banning "commingling." BellSouth at 69. The Commission, however, properly eliminated the ban on commingling in the *Triennial Review Order*. *See* Sprint at 77-78. There, the Commission recognized that the ban had the effect of forcing competitive carriers to manage two "parallel" networks and denying competitive carriers the ability to obtain scale economies, and that the ban was not supported by *any* engineering policy. *Triennial Review Order* ¶ 581. Indeed, the Commission found that the Bells' ban on commingling was so *anticompetitive* that it violated both section 201 and 202 of the Act. *Id.* The Bells do not even attempt to show that these findings were flawed as a matter of law, policy or fact.

services," because packet-switched or other innovative providers would not be able to satisfy the sort of usage-based test the Bells proposed. *Id.* ¶ 613. The Bells simply ignore these findings, which are amply supported by substantial evidence. *See id.* ¶¶ 596, 613-14 (collecting record evidence); *see also id.* ¶ 615.

Finally, the Commission should permit "conversions" of EELs. *Cf.* Qwest at 74-75; SBC at 93-94. Although the D.C. Circuit was concerned that conversions during the term of an existing customer contract would only provide the carrier with "higher profits" while being unnecessary to enable competition, *USTA II*, 359 F.3d at 593, that concern simply does not apply with regard to *renewal* contracts, let alone new contracts.[42] In those cases, there is a substantial risk that an IXC purchasing special access will be unable to win or retain the customer's business, because it will be unable to match the price that the Bell can offer due to its unfair access cost advantage. *See supra* Part II. This is particularly true for renewals. In many instances, the Bells recover most, if not all, of their up-front costs of a facilities build in the initial term of the access services they sell to competitive carriers. At the same time, competitive carriers get no rate reduction for the access services they purchase when they renew a special access commitment. Thus, having already recovered a significant percentage of its costs, at the time of the renewal, the Bell has the ability to offer much lower rates than the competitive carrier, which must continue to pay access rates that do not reflect the fact that substantial cost recovery has already occurred.

[42] In addition, as explained below, competitive carriers should be permitted to convert from special access to EELs for existing contracts because those retail services may be provided at a loss.

This analysis is also the answer to Qwest's claim that it should be "presumed" that a carrier that uses special access to serve a customer today is not "impaired by using special access to reach additional customers premises in the same wire center that it is not currently serving." Qwest at 76. As a matter of logic, Qwest's proposal is flawed. There are many reasons why the fact that a carrier has been able to serve some customers in a wire center does not suggest that it can compete for the customers that it does not serve using special access. Most importantly, the carrier may be unable to compete for many customers because of the high costs of special access services. *See supra* Part III.A (demonstrating that competitive carriers cannot profitably offer many services using special access). Moreover, the carrier may have won its existing customers at a time during which the ILEC lacked the ability to offer the service and thus the incentive to price squeeze. As explained in AT&T's opening comments (at 120-23), the Bells' incentive and ability to execute price squeezes is steadily increasing. Thus, the fact that a carrier won customers *in the past* using special access says little about its ability to retain those customers in competition with the Bells when the customers' contracts expire. This is particularly true in Qwest's case. Since *USTA II*, Qwest has substantially raised its special access rates. AT&T at 123. Thus, the fact that a carrier won the customer using special access under the prior, lower rates in no way demonstrates that it could do so at the *higher* rates Qwest now charges for special access. At bottom, adopting Qwest's suggestion would do an end run around the impairment criteria and foreclose the ability of carriers to convert from special access specifically where they *are* impaired.

The Commission should also permit competitive carriers immediately to "convert" special access circuits to cost-based UNEs even during the term of a customer's contract. *See USTA II*, 359 F.3d at 591. From an administrative standpoint, it simply makes no sense to

prevent conversions, as this will necessarily require the Commission to referee numerous disputes as to whether the customer is "new" or the contract is to be renewed.[43] Similarly, as the Bells concede (SBC at 94 n.285), the competitive carrier may have been providing service using special access *at a loss*. Clearly, in such cases, competitors do not "have access to necessary inputs at rates that allow competition to flourish" and there is "need for the Commission to impose the costs of mandatory unbundling." *USTA II*, 359 F.3d at 576. Given the costs that such an inquiry would impose on the Commission (indeed, it would be similar to the price squeeze inquiry discussed above), the Commission would be justified in adopting a rule that allowed conversion of all special access circuits.

V. THE COMMISSION SHOULD CLARIFY ITS RULES REGARDING ACCESS TO CUSTOMERS SERVED BY IDLC EQUIPMENT.

In its *Notice*, the Commission sought comments on "whether and how we should clarify our rules regarding access to customers served by integrated digital loop carrier [IDLC] equipment in a manner that promotes facilities-based deployment." *Notice* ¶ 11 n.38. In response, BellSouth argues that the Commission "should refrain from creating any further rules" in this area, because BellSouth already make all of its loops available in a nondiscriminatory manner and provides access to loops served by IDLC "in at least eight different ways." BellSouth at 31 n.117 & Milner Aff. ¶ 3.

[43] In this regard, SBC is simply incorrect (at 93) that *USTA II* held as a matter of law that the Commission cannot order conversions during the term of existing contracts. The Court there only addressed the justification offered by the Commission in the *Triennial Review Order* for conversions of existing service, which was not based on administrability grounds. As the *USTA I* court expressly "assumed," *USTA I,* 290 F.3d at 425, § 251(d)'s "at a minimum" clause authorizes rules that require unbundling even in conditions where impairment does not exist if there is good cause for the requirement, such as administrability concerns. AT&T at 115-23.

BellSouth's argument for the *status quo* should be rejected. To be sure, the Commission should reaffirm its holding in *Triennial Review Order* that ILECs are required to give competitive carriers access to the non-packetized capabilities of hybrid copper/fiber loops, regardless of whether such loops are served by IDLC or NGDLC. However, the Commission needs to clarify its rules to ensure that competitive carriers enjoy the full functionalities of hybrid loops to which they are entitled by the *Order*. Absent such clarification, the development of facilities-based competition is likely to be impaired.

In the *Triennial Review Order*, the Commission held that although ILECs are not required to unbundle the packetized capabilities of their hybrid loops to enable competitive carriers to provide broadband services, the ILECs nonetheless were obligated "to provide unbundled access to the features, functions, and capabilities of hybrid loop that are not used to transmit packeted information." *Triennial Review Order* ¶ 289. To ensure that competitive carriers remained able to provide broadband services, the Commission specifically required ILECs to provide unbundled access to a complete transmission path over their Time Division Multiplex Networks. *Id.*

With respect to the provision of narrowband services, the *Triennial Review Order* required ILECs to provide "an entire non-packetized transmission path capable of voice grade service (*i.e.*, a circuit equivalent to a DS0 circuit) between the central office and customer's premises." *Id.* ¶ 296. The *Order* emphasized that this requirement applies even when a hybrid loop is served by IDLC systems. *Id.* ¶ 297 ("we require incumbent LECs to provide requesting carriers access to a transmission path over hybrid loops served by Integrated DLC systems"). In fact, the Commission held that even when an ILEC's usual methods of providing such access (migration of the IDLC-served customer to a spare copper facility or to Universal DLC systems)

were unavailable, an ILEC "must present requesting carriers a technically feasible method of unbundled access." *Id.*

Although the Commission certainly should not reduce or otherwise limit these obligations, the rules established by the *Triennial Review Order* regarding hybrid loops require clarification, as other commenters have recognized. *See* Loop-Transport Coalition at 142-144 (stating that the "rules have proven to be unclear since their adoption"). That is particularly the case with respect to IDLC, which the ILECs are using to serve an increasingly large percentage of loops on their networks. In many central offices, the percentage of loops served by IDLC exceeds 50 percent, and sometimes even 70 percent. *See* AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 57; MCI at 68-69 & Starkey-Morrison Dec. ¶¶ 66, 74. Thus, the failure of ILECs to meet their access obligations with respect to IDLC will substantially impair the ability of competitive carriers to serve a significant number of actual or potential customers. *See* Van de Water Reply Dec. ¶¶ 30 n.9, 33.

For these reasons, it is essential that the Commission clarify the ILECs' obligations with respect to both narrowband and broadband in the context of hybrid loops served by IDLC or next generation digital loop carrier ("NGDLC"). In the context of narrowband, the Commission should clarify the extent of an ILEC's obligations when the ILEC lacks the spare copper or universal digital loop carrier ("UDLC") necessary to transfer a UNE-P subscriber of voice service (but not DSL service) and whose loops is served by IDLC facilities. Although the Commission stated that in such circumstances the ILEC must provide "a technically feasible method of unbundled access" (*Triennial Review Order* ¶ 297), the other "alternative" methods of migration described by BellSouth would be impractical and prohibitively expensive. *See* Van de Water Reply Dec. ¶¶ 13-30 (analyzing the "eight different alternatives" described by BellSouth).

The Commission also should clarify the ILECs' obligations with respect to broadband in the context of hybrid loops served by a NGDLC arrangement – an issue that was not specifically addressed in the *Triennial Review Order*'s discussion of the broadband issue. *See Triennial Review Order* ¶¶ 289-295.[44] In addition to the increasing presence of loops served by these arrangements, competitive carriers face the prospect of deploying their own facilities at a time when demand for DSL service continues to grow, and customers expect carriers to be able to provide both voice and DSL service. However, a customer will be unable to transfer its voice *and* DSL services to a competitive carrier unless the competitor is entitled to the same full functionality of the loop as it may currently receive from the ILEC via an NGDLC arrangement. Therefore, a competitive carrier likely will lose any opportunity it may have of migrating that customer to its competitive service offer. Van de Water Reply Dec. ¶¶ 33-34, 36-38.

A copper loop remains the *only* means by which a competitive carrier can continue to provide both voice and DSL service to a customer. *Id.* ¶¶ 38. Neither UDLC (which can be used to migrate a customer taking only voice service) nor the other "alternatives" described by BellSouth is compatible with DSL service. *Id.* ¶ 18, 12, 24, 28, 30. However, alternative copper facilities may not always be available. *See, e.g., Id.* ¶ 16; PACE Coalition, Hou Aff. ¶ 6.

The Commission should therefore clarify its rules in two respects. First, the Commission should require that when a competitive carrier is providing only voice service to a new or existing customer, and the ILEC wishes to provision IDLC, the ILEC must move the competitive carrier's customer to spare copper loop facilities or UDLC. In those circumstances where neither spare copper nor UDLC is available, the ILEC should be required to allow the competitive

[44] Unlike NGDLC, most IDLC systems support only voice grade loops, and cannot be used to provision DSL service. *See* Van de Water Reply Dec. ¶ 38; *Triennial Review Order* ¶ 218 n.668.

carrier to continue to provide service to the customer through the UNE platform – which, aside from migration to copper or UDLC, is the only practical means of enabling the competitive carrier to continue to provide voice service. Van de Water Reply Dec. ¶ 35.

Second, the Commission should require that if an existing customer of a competitive carrier is currently being provided voice and DSL service through a copper loop, and the ILEC wishes to upgrade the customer's facilities to IDLC, the ILEC must either maintain the existing DSL-capable copper loop or move the competitive carrier's customer onto spare DSL-capable copper facilities, whenever a spare is physically available. In addition, the Commission should require that when a customer is currently receiving both voice and DSL service from the ILEC through an NGDLC arrangement, and the retail customer wishes to migrate to a competing carrier, the ILEC should be required to move the competitive carrier's customer onto spare copper facilities.[45] Absent such action, the ILEC's use of IDLC will preclude the competitive carrier from providing DSL service, and thus deny the unbundled access to the non-packetized functionalities of the hybrid loop required by the *Triennial Review Order*. *Id.* ¶ 39-40.

These clarifications, if adopted, will promote the Commission's goal of facilities-based deployment, because they will give carriers the assurance that they will enjoy the full functionality of the loop – and, therefore, that they will be able to provide the services their customers demand. With that assurance, competitive carriers will have the incentive to make the necessary investments to serve customers through their own facilities. By contrast, absent

[45] In those instances when spare copper is not available, the ILEC should be required either to move the customer to fiber (whenever fiber is physically available) or to provide some other "technically feasible method of unbundled access" to a transmission path over the customer's loop. *See Triennial Review Order* ¶ 297. The UNE-P platform is not such an option, because the UNE-P cannot be used to provide DSL service. Van de Water Reply Dec. ¶ 39.

adoption of the clarifications, facilities-based development will be impeded. Competitive carriers will be reluctant or unwilling to deploy facilities to serve customers if they face the prospect that they will be unable to provide service to the substantial percentage of customers using loops served through IDLC or NGDLC arrangements. *Id.* ¶¶ 34, 40.

VI. THE COMMENTS CONFIRM THAT THE COMMISSION SHOULD REAFFIRM ITS REQUIREMENT THAT ILECS IMPLEMENT SEAMLESS AND COST-EFFECTIVE BATCH CUT PROCESSES.

The comments confirm that an effective, efficient batch hot cut process – "a seamless, low-cost process for transferring large volumes of customers" (*Triennial Review Order* ¶ 423) – is an essential component of any transition from the UNE-P to the provision of service through a competitive carrier's own facilities. AT&T at 169-175; ALTS at 99-100; GCI at 31-33; McLeod at 31-35; PACE Coalition at 98; Telscape at 10. Unless an adequate and cost-effective batch hot cut process is in place, competitive carriers using self-deployed switches (or leased capacity on third-party switches) will face precisely the same operational and economic barriers to competitive entry that the *Triennial Review Order* found in the context of individual hot cuts. *See Triennial Review Order* ¶¶ 459, 464-473; AT&T at 169-170; Montana PSC at 4; Supra at 32.

Predictably, the Bells contend that they have established batch hot cut processes that eliminate the problems with the individual hot cut process described in the *Triennial Review Order*. BellSouth at 26-27; Qwest at 49, 53, 59; SBC at 47, 49; Verizon at 113. That contention is illogical, since the ILECs' proposed batch cut processes have not been adequately tested to determine whether they even work as promised, much less whether they constitute a "seamless, low-cost process." AT&T at 171. Even more importantly, the Bells' contention is flatly contrary to reality. As the comments demonstrate, *no* ILEC has proposed or implemented an adequate hot batch cut process to date. *Id.*; CompTel at 44; GCI at 31; MCI at 48.

The Bells attempt to support their position that "the problem has been solved" by citing the performance data that they report to state commissions. *See* BellSouth at 26-27; Qwest at 50, 52; SBC at 47 & Att. B; Verizon, Maguire Aff. ¶¶ 4, 35. But the Bells presented similar data, supporting the same position, in the last phase of the *Triennial Review* proceeding. The Commission correctly rejected such data because they provide no indication of how the ILECs' hot cut processes would function in an environment where the ILECs no longer provided the UNE platform, and vastly higher volumes of hot cuts would be performed. [46]

More fundamentally, the ILECs' performance data cannot alter the fact that the operational and economic barriers that the *Triennial Review Order* found in the hot cut process – including the manual nature of the physical cutover process and the high non-recurring costs ("NRCs") of hot cuts – remain today. *E.g.,* GCI at 32; MCI at 47-48, 50-52; Momentum at 10; PACE Coalition at 98 & Hou Aff. ¶¶ 6, 9; Supra at 3; Telscape at 10. No batch hot cut process can totally eliminate these deficiencies, because the ILECs' batch processes still will rely heavily on manual work to perform the cutover, "thereby failing to address the most critical bottleneck in

[46] *See Triennial Review Order* ¶ 469 & n.1434 (rejecting performance data purportedly showing that ILECs' current hot cut performance is satisfactory, because "the issue is not how well the process works currently with limited hot cut volumes"). The ILECs also resurrect their argument that the Commission's previous decisions approving their Section 271 applications constitute a finding that their hot cut processes are adequate. *E.g.,* SBC at 43-46; BellSouth at 26. As the Commission stated in rejecting those arguments last year, "the number of hot cuts performed by BOCs in connection with the section 271 process is not comparable to the number that incumbent LECs would need to perform if unbundled switching were not available for all customer locations served with voice-grade loops." *Triennial Review Order* ¶ 469. Although the *USTA II* decision found the Commission's ruling insufficient to support a nationwide finding of impairment with respect to switching, it did not question the reasonableness of the Commission's conclusion that its § 271 decisions are not a reliable basis for assuming that an ILEC's performance in provisioning hot cuts will be adequate in an environment where (in contrast to the situation that existed when it filed its Section 271 applications) the ILEC is not required to provide unbundled switching.

the loop provisioning process." MCI at 48; *see also* BellSouth at 30 ("The actual provisioning work used to perform a hot cut in the batch process is the same process BellSouth uses its individual hot cut process").

Nonetheless, an efficient, low-cost batch hot cut process can enable competitive carriers to realize certain efficiencies and cost savings that they cannot achieve under the current basic hot cut process. AT&T at 169-170; MCI at 48. That is why the *Triennial Review Order* concluded that an adequate batch hot cut process is "necessary, at a minimum, for carriers to compete effectively in the mass market." *Triennial Review Order* ¶ 487; *see also id.* ¶ 474.

The comments agree that the Commission *must* establish national standards and requirements if its goal of a "seamless, low-cost" batch hot cut process is ever to be achieved. *See* AT&T at 170-172; GCI at 31-36; McLeod at viii, 31-35; PACE Coalition at 98-99, 103-106; Telscape at 10-12. Although state commissions found numerous deficiencies with the ILECs' hot cut processes in their proceedings to implement the *Triennial Review Order*, few (if any) state commissions have met the *Triennial Review Order*'s requirement that they approve a batch hot cut process that will make the hot cut process more efficient and economical for competitive carriers. *See Triennial Review Order* ¶ 460. Instead, most state commissions have either suspended or closed their proceedings in the wake of *USTA II*. AT&T at 170; MCI at 47-48. In view of the relative inactivity of the State commissions, and the ILECs' failure to propose any batch hot cut processes that are consistent with the requirements of the *Triennial Review Order*, the Commission should – indeed must – establish baseline requirements for batch hot cut processes. AT&T at 171-175.[47]

[47] Even SBC suggests that the Commission should establish national standards, arguing that the Commission should find that its "voluntary" proposed batch hot cut process is adequate. SBC at (continued . . .)

A. The Commission Should Require That Batch Hot Cut Processes Include All Migrations of Loops, Including IDLC-Served Loops, To the Switch of Another Carrier.

First, the Commission should require that any batch hot cut process include *all* migrations of loops from one carrier's switch to another, regardless of the type of loop involved an regardless of the identity of the carrier to whose switch the loop is being migrated. *E.g.,* AT&T at 171-172; PACE Coalition at 100. For example, the Commission should prohibit ILECs from imposing restrictions on the use of batch hot cut processes for loops served by IDLC facilities like those currently imposed by Verizon, Qwest, and BellSouth. *See* AT&T, Sczepanski-Van de Water-Norris Dec. ¶¶ 61-68; PACE Coalition at 100. These restrictions are a significant impediment to facilities-based competition, because they preclude competitive carriers from serving a substantial number of lines.[48]

As BellSouth acknowledges, an ILEC is *required* to include IDLC-served loops in its batch hot cut process, as part of its obligation to "provide competitors with access to unbundled loops, regardless of whether the BOC uses integrated digital loop carrier technology or similar remote concentration devices for the particular loops sought by the competitor." BellSouth at 31 & n.117. There can therefore be no legitimate justification for the ILECs' restrictions on IDLC loops, legal or otherwise. Although Verizon asserts that it excludes IDLC-served loops from its

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(. . . continued)
60. AT&T disagrees, however, with SBC's assertion that the Commission should "foreclose the states from imposing additional or different batch cut requirements." *Id.* The Commission should set baseline requirements for batch hot cut processes, but leave state commissions the flexibility to impose additional requirements to meet state-specific conditions. *See* AT&T at 171; McLeod at 34-35.

[48] *See* AT&T at 172; PACE Coalition at 100. In some central offices of the ILECs, the percentage of lines served by ILEC is 70 percent or higher. AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 57; MCI at 68-69 & Starkey-Morrison Dec. ¶¶ 66, 68; Supra at 16.

process "[b]ecause of the additional work involved outside Verizon's central office" to migrate such loops, its rationalization is belied by the practices of SBC, which *includes* such loops in its own batch hot cut process. *See* Verizon, Maguire Dec. ¶ 29; AT&T at 172 n.72 & Sczepanski-Van de Water-Norris Dec. ¶¶ 69-70.[49]

Apparently recognizing that their restrictions on IDLC-served loops are indefensible, Qwest and BellSouth distort the true nature of their processes. Qwest, for example, states that it will provision IDLC-served loops "in batches of up to 40 per day per State, for an additional price" to cover the cost of dispatching a technician. Qwest at 49-50. Qwest's description, however, is highly misleading. Qwest will perform such cutovers *only* for competitive carriers who sign a "Qwest Platform Plus" ("QPP") agreement with Qwest or amend their current interconnection agreements ("ICAs") with Qwest to include the "batch hot cut language" of the QPP agreement. *E.g.,* Qwest, Campbell Dec. ¶ 12 & Pappas Dec. ¶¶ 45, 79. As stated in Qwest's QPP agreement with MCIMetro, IDLC "is not a part of [Qwest's] standard Batch Hot Cut Process." *Id.*, Ex. WC-3, at 4 (§ 3.6).[50]

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[49] SBC, however, effectively takes with one hand what it gives with the other. Although it includes IDLC loops in its batch hot cut process, SBC's proposed batch hot cut rates for IDLC-served loops are two to three times higher than those for a non-IDLC loop. In some states in SBC's region, competitive carriers would pay approximately $80.00 in additional NRCs to migrate an IDLC-served loop under the batch hot cut process. *See* AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 187; MCI at 70.

[50] *See also* Qwest, Pappas Dec. ¶¶ 44-45 (only conversion orders "where no field dispatch is required are eligible for [Qwest's standard] BHCP at the reduced rate," and Qwest must dispatch a field technician 100 percent of the time when the loop is served by IDLC). Although Qwest contends that AT&T agreed in December 2003 that IDLC-served loops need not be included in its batch hot cut process, Qwest's narrative is highly incomplete. *See* Qwest, Pappas Dec. ¶ 49. AT&T made the statement cited by Qwest on the basis of Qwest's representation that only 9 percent of the loops in its region were served by IDLC. Subsequent to that statement, however, AT&T learned that the problem was far more significant than it initially believed. Specifically, AT&T learned that many large central offices in Qwest's network have IDLC penetrations (continued . . .)

Even for those competitive carriers who sign the QPP agreement or the necessary ICA amendments, Qwest's limitation of each carrier to a total of 40 IDLC-served lines *per state* severely impedes those carriers' ability to continue providing service to customers using such loops, particularly in some of Qwest's central offices, where a high percentage of loops is served by IDLC. *See* MCI at 68-69. Moreover, in order to ensure that the IDLC-served lines in their batch orders do not exceed the 40-line limitation, a competitive carrier would be required to conduct a costly, time-consuming, line-by-line query in Qwest's pre-ordering systems to determine how many of the lines in its proposed batch are served by IDLC. Even after such an inquiry, the competitive carrier would have no assurance that its order is consistent with Qwest's limitations, given the questionable reliability of the data in Qwest's pre-ordering systems. *See* AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 66.[51]

(. . . continued)
ranging from 20 percent to as high as 68 percent. *See* AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 57. It is one thing to say that 9 percent of loops will be excluded from the batch hot cut process. It is quite another to say that up to 68 percent of loops will be excluded, thereby preventing competitive carriers from migrating significant numbers of loops under the process. As a result, AT&T argued thereafter in state proceedings that IDLC-served loops should be included in the batch hot cut process, and – as Qwest is well aware – explained the above-described reasons for its change in position. *See, e.g.,* Rebuttal Testimony of Robert V. Falcone in Nebraska PSC Application No. C-3026, filed February 17, 2004, at 21-23 ("Falcone Neb. Test.").

[51] Qwest imposes different "premiums" for batch migrations of loops served by IDLC according to whether the competitive carrier entered into a QPP agreement or simply amended its ICA to include the "batch hot cut process language" of the QPP. Competitive carriers who have signed a QPP agreement must pay an "IDLC premium" for *every* loop that they migrate under the batch cut process, including all non-IDLC loops. By contrast, competitive carriers who simply amended their ICAs must pay a higher IDLC premium, but only for those IDLC loops migrated under the process. Qwest, Pappas Dec. ¶ 45. This distinction is illogical, as reflected by Qwest's failure to offer any justification for it. *Id.* (justifying IDLC premium as necessary "to allow Qwest to recover the cost of having to dispatch a technician to the field," but offering no explanation for the differences in IDLC premiums under the QPP agreement and the ICA amendments).

BellSouth's claim that its batch hot cut process "encompasses" IDLC-served loops is equally misleading. BellSouth at 31. BellSouth conveniently fails to mention that it limits the number of IDLC cuts under its batch cut process to 70 lines per day in a given central office for *all competitive carriers combined*. AT&T, Sczepanski-Van de Water-Norris Dec. ¶¶ 61-64. By itself, that restriction inhibits the competitive carrier's ability to migrate such lines in a timely manner. But the adverse effects of that restriction are compounded by BellSouth's policy that it will cut over no more than 200 lines (both IDLC and non-IDLC) in a central office on a given day for all competitive carriers combined. *Id.* As in the Verizon and Qwest regions, a competitive carrier can ensure that it is not exceeding the IDLC restrictions only by performing a line-by-line determination using the ILEC's pre-ordering systems – a process that is costly and likely to delay submission of the batch hot cut request. *Id.* ¶ 68.

B. The Commission Should Establish Standards to Ensure That Batch Hot Cut processes Are Seamless, Economical, And Efficient For Competitive Carriers.

Second, the Commission should establish requirements to ensure that batch hot cut processes, in actual operation, will be more economical and efficient for competitive carriers. The comments demonstrate that the Commission should establish requirements regarding third-party testing of the batch hot cut processes, the competitive carrier's control over the timing and sequence of the batch hot cuts, and the operations support systems ("OSS") associated with the batch hot cut process.

Third-Party Testing Of The Batch Hot Cut Process. Most importantly, the Commission should require that any ILEC's proposed batch hot cut process be comprehensively tested by a third party, under specified testing criteria, before the ILEC may make it commercially available to competitive carriers. AT&T at 172-173. The batch hot cut processes of SBC and Verizon have not been subjected to *any* independent third-party testing. *See* AT&T,

Sczepanski-Van de Water-Norris Dec. ¶¶ 95-99. SBC, in fact, has challenged the authority of the Michigan Public Service Commission to require such testing. *Id.* ¶ 95-96 (describing SBC's pending court action challenging the MPSC's order).

The batch hot cut processes proposed by BellSouth and Qwest also have not undergone adequate third-party testing. Although BellSouth and Qwest cite the previous testing of their processes by third parties (BellSouth at 33-34; Qwest at 53), they admit that significant aspects of their processes have not yet been implemented.[52] In any event, the "testing" on which BellSouth and Qwest rely was so flawed that it cannot reasonably be regarded as a reliable indication of the efficacy of their respective processes. Both the test conducted by PriceWaterhouseCoopers ("PwC") for BellSouth, and the test performed by Hitachi for Qwest, evaluated processes that are not the same as those currently proposed. BellSouth and Qwest made significant changes in their processes following the conclusion of the testing. *See* AT&T, Sczepanski-Van de Water-Norris Dec. ¶¶ 101, 107.[53] Both tests were flawed in other significant respects. Hitachi's test for Qwest, for example, involved only 100 lines and three central offices for a one-month period, was not blind, and relied on highly questionable assumptions provided

[52] *See, e.g.*, BellSouth at 29 n.105, 31-32 (asserting that BellSouth "currently is developing a web-based scheduling tool" that will allow competitive carriers to schedule due dates for batch cut orders on their own, and three enhancements to its batch hot cut process "are in progress towards completion"); Qwest at 50-51 (stating that "nearly all" of the improvements that it intends to incorporate into its batch hot cut process will be implemented by October 2004, and the remainder by the middle of 2005). As BellSouth acknowledges, no competitive carrier to date has made extensive use of its batch hot cut process. BellSouth, Ainsworth-Milner-Varner Aff. ¶ 11.

[53] The PwC review did not even reflect the types of migrations that BellSouth experiences today. During the PwC test, BellSouth implemented 80 percent of the cutovers using non-coordinated hot cuts (its simplest cutover method), even though such cuts comprise only 3 percent of the cutovers BellSouth actually has been performing. AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 108.

by Qwest (including Qwest's hot cut volume forecasts). *See id.* ¶¶ 102-105.[54] In view of these deficiencies, Qwest's claim that the Hitachi test verified that its batch hot cut process "works" rings hollow.[55]

BellSouth's claim that the PwC "attestation" "constitutes conclusive evidence that BellSouth's batch hot cut process works" is equally specious. *See* BellSouth at 33.[56] PwC simply determined whether BellSouth's process "enables a CLEC to migrate multiple end-users from UNE-P service to UNE-L" and whether the process is used for both batch hot cuts and individual hot cuts across BellSouth's region. BellSouth, Ainsworth-Milner-Varner Aff. ¶¶ 50, 62. PwC did *not* examine whether BellSouth's batch hot cut process is the seamless, low-cost process that the Commission mandated in the *Triennial Review Order*. Given the number of deviations found by PwC in the test, PwC's report constitutes – at most – a finding that

[54] Qwest contends that it conducted additional testing in Washington and Idaho following the release of the Hitachi report. Qwest, Pappas Dec. ¶ 77. However, Qwest provides no details underlying its contention. Nor does Qwest set forth any data describing the results of the test. Instead, Qwest asserts only that the results of the alleged additional testing were "fairly consistent" with those observed in the Hitachi test. *Id.*

[55] *See* Qwest, Pappas Dec. ¶ 7. Despite Qwest's claims regarding the testing of its process, the Attorney General of New Mexico calls for *more* testing of that process, citing the total lack of commercial use of Qwest's process to date and the uncertainty that "surrounds just which loops Qwest proposes to use in the process and which loops could be excluded." NM Atty. Gen. at 5.

[56] BellSouth also cites the BearingPoint test of its OSS, and 18,000 cutovers that it performed for a customer over a four-month period, as proof of the efficacy of its batch hot cut process. BellSouth, Ainsworth-Milner-Varner Dec. ¶¶ 61, 67. The BearingPoint test, however, focused almost exclusively on the performance of the OSS in connection with ordering processes for hot cuts, rather than on the actual physical provisioning of the cut. AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 93 n.19. Furthermore, as BellSouth acknowledges, the customer for which it allegedly performed 18,000 cutovers was not even using the batch hot cut process. BellSouth, Ainsworth-Milner-Varner Dec. ¶ 67.

BellSouth is able to migrate large volumes of lines, even if it does a poor job of doing so. AT&T, Sczepanski-Van de Water-Norris Dec. ¶¶ 107, 109.[57]

Competitive Carriers' Control Over the Timing and Sequence of Batch Hot Cuts. In addition to requiring comprehensive third-party testing of the ILECs' batch hot cut processes, the Commission should require that any such process give competitive carriers sufficient control over the timing and sequence of batch hot cuts to ensure that the cutover will occur at the time least inconvenient to the carrier's customer. AT&T at 172-173 & Sczepanski-Van de Water-Norris Dec. ¶¶ 115-138. The comments of the Bells only reinforce the need for such a requirement. BellSouth and Qwest acknowledge that, although they allow competitive carriers to specify the day of the cutover, competitive carriers may only select "time windows" – *i.e.,* a range of four hours (in BellSouth's region) and eight hours (in Qwest's region) on the day during which the hot cuts will be performed. BellSouth, Ainsworth-Milner-Varner Aff. ¶ 41; Qwest at 51. Because these "windows" are so broad, the competitive carrier has no way of knowing precisely what time the cutover will begin or end. More fundamentally, the "windows" inhibit the competitive carrier's ability to meet the preferences of its customers, who may prefer that the cutover take place outside the "windows" period. AT&T, Sczepanski-Van de Water-Norris Dec. ¶¶ 122-123.[58]

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[57]The PwC report is also deficient because it fails to describe significant aspects of the methodology that PwC used. For example, PwC's report does not make clear when and over what period of time the pre-wiring (the most time-intensive part of the hot cut) was completed, and how the non-hot cut central office work was handled. As a result, the methodology and the results of the test are highly suspect. AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 108.

[58] Qwest asserts that allowing competitive carriers to specify the time (and not merely the date) of the batch cutovers would "interrupt the efficient task flow and reintroduce the need for [Qwest] to communicate via telephone with competitive carriers regarding work start and stop times." Qwest, Pappas Dec. ¶ 56. Qwest's explanation, however, does not withstand scrutiny. (continued . . .)

Verizon's batch hot cut process gives competitive carriers even *less* control over the timing of the takeover. Verizon "manages the entire process from order acceptance to porting the end user's telephone number." Verizon, Maguire Dec. ¶ 29. Unlike BellSouth and Qwest, Verizon does not even permit competitive carriers to specify the date of the cutover. Thus, when they place a batch hot cut order, competitive carriers have no idea when the cutovers will actually take place. Instead, Verizon simply notifies the competitive carrier three days in advance of the due date it has decided to propose – which the competitive carrier can only accept or reject. If the competitive carrier rejects the proposed date, it must wait again until Verizon accumulates a "critical mass" of orders, which can take as long as an additional 26 business days.[59] Verizon's arrangement impedes the development of effective competition, because it is

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Qwest acknowledges that competitive carriers *can* specify the precise time of a cutover if they use its existing basic hot cut process – where the risk of "task flow interruptions" and additional communications surely must also exist. *Id.* Furthermore, the fact that SBC *does* allow competitive carriers to specify the exact time of the batch cut (*see* AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 127) suggests that Qwest exaggerates the problems it describes.

[59] *See* Verizon, Maguire Aff. ¶¶ 30-31 (admitting that Verizon requires competitive carriers to specify a due date 26 business days in the future when they submit a batch hot cut request); AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 124. Unlike the batch cut processes of other ILECs, Verizon's proposed batch hot cut process also does not give competitive carriers control over when the customer's ported number will be activated at the NPAC (Number Portability Administration Center). *Compare, e.g.,* Qwest, Pappas Dec. ¶ 70 (notification of NPAC "is beyond the control" of Qwest and its batch hot cut process). Instead, in order to use Verizon's batch hot cut process, a competitive carrier must authorize Verizon to submit the final port-activation number to NPAC. Verizon, Maguire Dec. ¶ 33; AT&T, Sczepanski-Van de Water-Norris Dec. ¶¶ 128-129. Verizon's requirement renders competitive carriers unable to monitor the timeliness of the hot cut during the critical period between the physical cutover of the loop and the number port at NPAC. This increases both the risk that the customer will lose its ability to receive incoming calls and the difficulty of restoring any lost connectivity. These problems will likely result in customer dissatisfaction and damage to the competitive carrier's reputation. AT&T, Sczepanski-Van de Water-Norris Dec. ¶¶ 129-131. Although Verizon admits that notification of NPAC of the completion of a cutover "has been traditionally handled by the competing carrier," it suggests that its requirement will benefit competitive carriers by
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not commercially feasible for a competitive carrier to retain or sign up customers without the ability to accommodate their needs during the hot cut, including the timing of the cutover. AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 126.[60]

Verizon (like BellSouth and Qwest) also does not allow competitive carriers to specify the sequence in which the lines are cut over under its batch hot cut process. *Id.* ¶¶ 132, 136. While this practice may increase Verizon's efficiencies (*see* Verizon, Maguire Aff. ¶ 34), it leaves competitive carriers even more "in the dark" as to the start and completion times of the cut. It creates particular problems for cutovers involving multi-line customers with features (such as "hunting") that can be disabled or compromised when the ILEC controls the sequence of the cutovers. AT&T, Sczepanski-Van de Water-Norris Dec. ¶¶ 132-135.

There is no legitimate justification for these restrictions. Unlike other ILECs, SBC *does* allow competitive carriers to specify the date, time, and sequence of their batch hot cuts. *Id.* ¶¶ 127, 136. The Commission should therefore require all ILECs to do the same.

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eliminating the need for coordination between the carriers at the time of the cutover. Verizon, Maguire Dec. ¶¶ 10, 33. Whatever benefits the competitive carrier might derive from Verizon's requirement, however, are substantially outweighed by the problems it creates for both end-users and competitive carriers.

[60] Verizon asserts that its "26-business-day accumulation period" for batch hot cut orders is unlikely to affect competitive carriers because, *inter alia*, they "currently do not tell their customers when a hot cut will take place." Verizon, Maguire Dec. ¶ 32 & n.3. Verizon's rationalization is disingenuous, because competitive carriers in its region have no control over the timing of the cutover, and therefore *cannot* tell their customers when the hot cut will take place. Moreover, the AT&T brief cited by Verizon lends no support to its assertions. *See id.*; Initial Post-Hearing Brief of AT&T Communications of NJ, L.P., filed July 2, 2004, in NJBPU Docket No. TO03090705, *Implementation of the Federal Communications Commission's Triennial Review Order*, at 47 ("Typically, in the case of a Project hot cut CLECs notify their existing UNE-P customers of the conversion to UNE-L via a letter informing them of a 'network upgrade' that will result in a brief outage and may impact use of certain features").

Operations Support Systems. The comments confirm that a batch hot cut process cannot be "seamless" and "low cost" for competitive carriers unless the ILEC provides adequate operations support systems associated with that process. Competitive carriers need OSS that not only enable them to track their batch hot cut orders efficiently and effectively, but also process their orders on a fully automated basis without manual intervention. AT&T at 173; GCI at 34-35; MCI at 57; PACE Coalition at 103-104.

An effective batch hot cut process requires a fully automated notification and tracking system that enables a competitive carrier to (1) monitor, track and verify its hot cut process from order submission through completion of the batch hot cut order, and (2) take corrective action promptly in response to problems that arise during the process. AT&T at 173 & Sczepanski-Van de Water-Norris Dec. ¶ 151; PACE Coalition at 103-104. Such a system is "essential" to "facilitate hot cuts and to remove many of the unnecessary, time-consuming manual provisioning steps, which are a recipe for additional error." PACE Coalition at 103-104. Even Qwest describes its proposed automated status notification tool as "instrumental in notifying the CLEC of order completion." Qwest, Pappas Dec. ¶ 33. Absent an adequate notification and tracking system, competitive carriers will be unable to manage the batch hot cut process and to minimize service disruptions to their customers. AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 148; GCI at 35.

Currently, however, the ILECs do not offer adequate automated tracking and notification systems. AT&T, Sczepanski-Van de Water-Norris Dec. ¶¶ 150, 158-164; PACE Coalition at 104. BellSouth, for example, has implemented a web-based notification tool only for non-coordinated hot cuts (which constitute only approximately 3 percent of the hot cuts that BellSouth performs); when a coordinated hot cut is completed, a BellSouth technician notifies

the competitive carrier by telephone. AT&T, Sczepanski-Van de Water-Norris Dec. ¶¶ 160-161; BellSouth, Ainsworth-Milner-Varner Aff. ¶¶ 41-42. In SBC's region, competitive carriers must utilize different interfaces, rather than a single notification tool, to obtain all of the status information that they seek. Some of the information which SBC provides is so generic that competitive carriers must follow up with SBC. And neither BellSouth nor SBC provides notification systems that fully enable two-way communications between the competitive carrier and the ILEC regarding status information that the ILEC provides. *Id.* ¶¶ 160, 162.

Unlike the three other major ILECs, Qwest has implemented *no* automated status notification system *at all.* Instead, Qwest simply promises that it will do so in mid-October. Qwest at 50 & Pappas Dec. ¶¶ 3, 33; AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 164.[61] As the *Triennial Review Order* recognized, Qwest's promises are entitled to no weight. *Triennial Review Order* ¶ 469 n.1437.[62]

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[61] Qwest's assertion that AT&T previously "demanded" notification of status by e-mail is a total misstatement of AT&T's position. *See* Qwest, Pappas Dec. ¶ 61. Although Qwest originally proposed e-mail as its method of status notification, AT&T took no position on the issue of e-mail notification until Qwest subsequently proposed its web-based Batch Status Tool ("BST"). When Qwest proposed the BST, AT&T objected to the BST as unacceptable because, rather than "push" the information to the competitive carrier, the BST required the competitive carrier to frequently and periodically check the BST. Although AT&T cited e-mails as an example of a "push transaction," at no point did it "demand" e-mail notification or suggest that e-mail notification would be adequate. *See* Falcone Neb. Test. at 15-16.

[62] Qwest and SBC argue that a competitive carrier can receive real-time notification that the cutover of a line is about to begin (or is about to end) by using "trap and trace technology," which would detect the Automatic Number Identification test performed immediately before and after the cutover. *See* Qwest, Pappas Dec. ¶¶ 43, 71; SBC at 59. There is no reason, however, why Qwest and SBC cannot provide notification tools that provide such information to competitive carriers on a real-time basis, rather than require them to resort to "trap and trace." *See* AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 163 n.41; Qwest, Pappas Dec. ¶ 72 (quoting AT&T representative as stating that trap and trace "should not be the only notification method available to CLECs"). Furthermore, the trap and trace mechanism, which was designed to trace the number from which a call has originated while the parties are still on the line, is poorly suited

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To ensure that competitive carriers receive the status information that they need, the Commission should adopt the requirements proposed by AT&T and the PACE Coalition in their opening comments. *See* AT&T, Sczepanski-Van de Water-Norris Dec. ¶¶ 152-156; PACE Coalition at 104-105. Specifically, the Commission should require the ILEC to implement a single, two-way automated system that provides competitive carriers, in real time, with: (1) notification that the order has been accepted by the ILEC, including sufficient order confirmation information (such as the projected date and time of the batch hot cuts); (2) notification of any provisioning issues that affect the performance of the requested cutovers; (3) notification that the batch hot cut order is otherwise in jeopardy; (4) notification regarding the performance and results of dial tone checks; (5) notification that an order is still pending; and (6) notification of completion of the batch hot cuts. *See* AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 152; PACE Coalition at 103.

In addition, the Commission should require ILECs to provide two methods of interfaces to the notification tool – the Web GUI and XML using the HTTPS delivery protocol – to ensure that competitive carriers can use the notification tool efficiently. ILECs should further be required to give competitive carriers the ability to download, sort, and store into their own

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to serve as a notification mechanism for competitive carriers. Using "track and trace" would also be burdensome and costly for competitive carriers, who would be required to program their switches for the particular phone lines being migrated and then "de-program" them after the lines had been cut over. Finally, the "track and trace" systems of Qwest and SBC have not undergone comprehensive third-party testing to determine their effectiveness. Although Qwest contends that its "trap and trace" technology was "tested by a CLEC as part of the BHC testing that was conducted," Hitachi's own report on that testing states that Hitachi did *not* evaluate that technology. *See* Qwest, Pappas Dec. ¶ 72 & Ex. DP-12 at 10 (stating that process improvements not available at the time of Hitachi's testing included "Use of trap and trace capabilities inherent in the CLEC's switch"); Falcone Neb. Test. at 46.

systems the status information that they receive from the ILEC, in the manner that best suits their needs. AT&T, Sczepanski-Van de Water-Norris Dec. ¶¶ 153, 155; PACE Coalition at 105.

Although Verizon's Work Provisioning Tracking System ("WPTS") falls short of meeting these various requirements in certain respects, the existence of WPTS – which Verizon describes as "unique" – demonstrates that the development of automated systems that meet these requirements is technically feasible. AT&T at 173 n.74 & Sczepanski-Van de Water-Norris Dec. ¶ 158; PACE Coalition at 105-106; Verizon, Maguire Aff. ¶ 18. The Commission should therefore require all ILECs to meet these requirements.

Finally, the Commission should require the ILECs to modify their OSS to maximize the flow-through capability of batch hot cut orders. AT&T at 173. Manual processing of orders creates a significant likelihood of errors, delays in provisioning, disruption of the customer's service, and higher costs to the competitive carrier for the order processing. AT&T, Sczepanski-Van de Water-Norris Dec. ¶¶ 166-167. The ILECs, however, have not provided sufficient flow-through capability to UNE loop orders, including orders for hot cuts. *Id.* ¶¶ 169-170; MCI at 57.[63] As MCI demonstrates, in some ILEC regions the percentage of UNE-L orders that flow through is substantially lower than that for UNE-P orders. MCI at 57. There can be no justification for subjecting batch hot cut orders to a higher frequency of manual intervention than

[63] Verizon's assertion that it has "already modified its OSS to provide for flowthough of hot cut orders from existing UNE-P arrangements" is highly misleading. Maguire Aff. ¶ 64. Verizon's own cost studies have shown that more than 45 percent of its hot cut orders fall out for manual processing. Only two months ago, the New York Public Service Commission admonished Verizon that it "should be able to refine the ordering stage of hot cuts such that orders should 'flow-through' Verizon's computer system 95 percent of the time." *See* AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 169; NYPSC Case 02-C-1425, *Proceeding on Motion of the Commission to Examine the Process and Related Costs of Performing Loop Migrations on a More Streamlined (e.g., Bulk) Basis*, Order Setting Permanent Hot Cut Rates, at 4 (August 25, 2004).

orders for the UNE-P, which seek to provide the same service. Consequently, at a minimum, ILECs should be required to design their OSS to provide the same flow-through capability for batch hot cut orders as for UNE-P orders. AT&T, Sczepanski-Van de Water-Norris Dec. ¶¶ 168, 172.

C. The Commission Should Again Require That the ILECs' Rates For Batch Hot Cuts Be TELRIC-Compliant.

Third, as the comments demonstrate, the Commission should reaffirm its holding in the *Triennial Review Order* (¶ 489) that "state commissions should adopt TELRIC rates for the batch hot cut activities they approve." *See* AT&T at 173-174; McLeod at 34; PACE Coalition at 101-102; Telscape at 11. In many states, the ILECs' proposed or actual rates for batch hot cuts (and for individual hot cuts) exceed TELRIC levels, including the levels that the *Triennial Review Order* found to be excessive even for individual hot cuts. In fact, some of the ILECs' proposed NRCs for batch hot cuts exceed those for individual hot cuts, despite the Commission's expectation that the batch hot cut process would be "low-cost" and result in some reduction of the non-recurring costs of the hot cut process.[64]

The Bells, understandably, say little about their proposed or actual NRCs for batch hot cuts. What they *do* say, however, reveals that they have no intention of charging TELRIC-compliant rates, absent regulatory intervention. Verizon (at 110) cavalierly dismisses hot cut costs of $50.00 or more as "a customer acquisition cost of the kind that is common across many industries" – ignoring, *inter alia*, the finding of the *Triennial Review Order* that rates of this level

[64] *See, e.g., Triennial Review Order* ¶¶ 423, 460; AT&T at 173-174 & Sczepanski-Van de Water-Norris Dec. ¶¶ 179-187; McLeod at 34-35; MCI at 62 & Starkey-Morrison Dec. ¶¶ 52-54; Momentum at 10-11; PACE Coalition at 101-103; Supra at 3, 28-31, 37; Telscape at 10-12.

contribute to the economic barriers erected by the hot cut process. *Triennial Review Order* ¶ 470.

BellSouth asserts that it charges 10 percent off the applicable individual nonrecurring charge in "recognition of the efficiencies gained through the batch process," without recognizing that such a modest reduction does not mitigate the economic burden caused by its excessively high rates for individual hot cuts. BellSouth at 34; AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 183; Supra at 37. In any event, aside from BellSouth's bald assertion, there is no evidence that BellSouth has even implemented its alleged 10 percent discount. AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 185.

SBC, quoting Paragraph 474 of the *Triennial Review Order*, contends that its batch hot cut process results "'in some reduction of the non-recurring costs' associated with hot cuts," but provides absolutely no details to support its contention. SBC at 59. In reality, SBC's proposed rates for its batch hot cut process (the "Defined Batch Process") represent only a modest reduction from its current rates for individual hot cuts. *See* MCI, Starkey-Morrison Dec. ¶ 55 & Ex. 5. Moreover, given the significant and unexplainable variations in its proposed NRCs from state to state, SBC's rates are clearly not cost-based. AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 188.[65]

[65] In addition to its "Defined Batch Process" (which has been the batch cut process on which SBC has relied in state proceedings as evidence of compliance with the *Triennial Review Order*), SBC cites its "Enhanced Daily" process and "Bulk Project" process. SBC at 58-59. However, the Enhanced Daily process is SBC's basic (individual) hot cut process, the NRCs for which are generally higher than for its proposed NRCs for the Defined Batch process. *See id.* at 58; AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 186 n.58; MCI, Starkey-Morrison Dec. ¶ 55 & Ex. 5. SBC's Bulk Projects process is available only for those competitive carriers who order hot cuts for 100 or more lines. SBC at 59. Finally, neither the Enhanced Daily process nor the Bulk Projects process could serve as an effective batch hot cut process, because they use the (continued . . .)

Qwest asserts that its proposed NRCs for its batch hot cut process are "generally below" the TELRIC prices established by state commissions. Qwest at 50. Even according to Qwest's own data, however, those reductions are modest. *See* Qwest, Campbell Dec. ¶ 12 (describing proposed batch hot cut rate of $46, as compared to rate of $50-$55 for individual hot cuts). Moreover, as reflected in Qwest's careful use of the word "generally," its proposed batch hot cut rates are *higher* than its current rates for individual hot cuts in some states in its service region. AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 182; MCI, Starkey-Morrison Dec. ¶ 54 & Ex. 4.

Qwest attempts to brush aside these facts by asserting that competitive carriers can receive additional "substantial reductions" under its batch hot cut process if they enter into the QPP agreement. Qwest at 50. But those reductions come at a substantial cost to the competitive carrier. A competitive carrier who enters into the QPP agreement is effectively required to serve most of its customers using Qwest's QPP offering, rather than through the use of its own facilities.[66] Furthermore, because QPP does not even require a hot cut, the value of Qwest's "substantial reductions" to a competitive carrier who enters into the QPP agreement is, at best, highly limited. *See* Qwest at 53.

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same flawed SBC OSS as the Defined Batch process. *See, e.g.,* AT&T, Sczepanski-Van de Water-Norris Dec. ¶¶ 162-163 (describing flaws in SBC's notification systems).

[66] Qwest's QPP agreement with MCIMetro, for example, states that MCI will receive a discount from Qwest's monthly recurring switch port rate only if the number of MCI's QPP lines as of October 31 is at least 90 percent of the sum of MCI's QPP and UNE-P lines as of October 31 of the preceding year. Qwest, Campbell Dec., Ex. WC-2, at 4 (§ 3.3). MCI therefore has a strong incentive not to use UNE loops to serve its customers, since doing so could deprive it of the discounts under the agreement. That is plainly why Qwest states that the agreement "allows Qwest to keep competitive carriers and their end-user customers on the Qwest network," and that "Qwest views the CLECs as another distribution channel for marketing these services." Qwest at 57-58.

The Bells' arguments cannot change the fact their NRCs for their batch hot cut processes are clearly excessive under TELRIC or any other reasonable benchmark. For example, the *Virginia Arbitration Order* issued by the Commission's Wireline Competition Bureau established an NRC of only $5.01 for *individual* hot cuts. *See Virginia Arbitration Order*, App. A. The PACE Coalition correctly points out that a $5.00 ceiling for individual hot cuts would also be consistent with the safe harbor rate that the Commission has established for presubscribed interexchange carrier ("PIC") changes. PACE Coalition at 101; *see also* Supra at 28-31 (proposing ceiling of $6.00 on NRCs for individual hot cuts, based on rulings of four State commissions). Under the *Triennial Review Order*, rates for batch hot cut processes should be even lower than these levels, given the efficiencies that can be obtained through the use of such processes. *See, e.g., Triennial Review Order* ¶ 460.

In view of the current high levels of the ILECs' NRCs for their batch hot cut processes, the Commission must once again make clear that pricing for batch hot cuts must comply with its TELRIC methodology. Unless the Commission does so, the excessive non-recurring charges for batch hot cuts, combined with the significant internal costs that a competitive carrier must incur in connection with such costs, will make it "prohibitively expensive" for a competitive for a competitive carrier to use its own facilities. *See Triennial Review Order* ¶ 470.

D. The Commission Should Establish Performance Metrics and Standards Specific To the Batch Hot Cut Process To Ensure That the Process Works Seamlessly and Efficiently.

Finally, the Commission should adopt performance measurements and standards specific to the batch hot cut process, and require the inclusion of these metrics in the ILECs' existing performance incentive plans (penalty plans). *See* AT&T at 174-175; GCI at 35. Absent such action, the ILECs will have no incentive to make their batch hot cut processes work seamlessly and effectively, because no metrics specific to the batch process are currently in place. *Id.*

Qwest and BellSouth effectively concede the need for the establishment of metrics specific to batch hot cut processes. For example, although Qwest asserts that its existing performance metrics already monitor loop installations, it acknowledges that only "certain aspects of these existing measurements should/will be applicable to the BHCP." Qwest, Pappas Dec. ¶ 73.

Even more significantly, BellSouth expressly proposes specific changes to its existing performance measurement plan "to enable further monitoring of BellSouth's performance" under the batch hot cut process. BellSouth, Ainsworth-Milner-Varner Aff. ¶¶ 96-107 & Ex. BLS-12. Although BellSouth's willingness to propose such changes is commendable, its proposal falls far short of what is needed. The majority of the metrics that BellSouth proposes to add or change would not be specific to the batch hot cut process, but would simply include performance data for that process with other performance data under a single broad metric. *See id.* ¶¶ 97, 102, 104. For example, BellSouth would include performance data regarding batch hot cuts in its existing metrics regarding reject intervals, firm order confirmation ("FOC") timeliness, and FOC and reject response completeness. *Id.* ¶ 102. The reported data for these metrics would therefore give no indication of BellSouth's performance for competitive carriers using the batch hot cut process. And the only one of BellSouth's proposed metrics that is batch hot cut-specific – UNE Bulk Migration Response Time – "will not be applicable" after the implementation of BellSouth's web-based scheduling tool, which BellSouth has scheduled for the end of October 2004. *Id.* ¶¶ 24, 101.

In addition to proposing few metrics that are specific to the batch hot cut process, BellSouth has proposed only a portion of the metrics that are necessary for a reliable assessment of its performance under the batch cut process. BellSouth's proposed metrics would not monitor

such critical areas as the installation intervals for coordinated batch hot cuts, the timeliness of the completion of coordinated batch hot cuts, or the percentage of time batch hot cuts are completed without a service disruption. *Compare id.,* Ex. BLS-12 with AT&T, Sczepanski-Van de Water-Norris Dec. ¶ 199 (listing metrics that should be established).[67] In addition, BellSouth does not propose that the benchmarks for metrics governing batch hot cuts be those governing its performance in provisioning the UNE platform, rather than the less stringent benchmarks that its Service Quality Measurements ("SQM") plan establishes for its UNE-L performance.[68] Using the UNE-P as a standard, however, is essential to ensure that a loop is cut over "as promptly and efficiently as incumbent LECs can transfer customers using unbundled local switching." *Triennial Review Order* ¶ 512; *see also* AT&T at 175.

VII. THE STATES ARE NOT PREEMPTED FROM IMPOSING ADDITIONAL OR SUPPLEMENTAL UNBUNDLING REQUIREMENTS

In its comments, AT&T demonstrated that the 1996 Act includes multiple express reservations of state commission authority to impose additional pro-competitive requirements under state law that go beyond the minimum federal requirements. AT&T at 187-96. AT&T's demonstration that such state regulation is not preempted was confirmed by other commenters.

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[67] Although BellSouth's declarants suggest that BellSouth is proposing a "Coordinated Customer Conversions Interval" that would measure the time to complete the hot cut from the start of the cutover through notification to the customer that the cutover has been completed, the metric that it has actually proposed in Kentucky would measure only the percentage of coordinated hot cuts which BellSouth *started* on time. *Compare* BellSouth, Ainsworth-Milner-Varner Aff. ¶ 105 *with id.*, Ex. BLS-12 at 9.

[68] For example, under BellSouth's SQM, order completion intervals for UNE-L orders (regardless of whether such orders require the dispatch of a BellSouth technician) are compared to all BellSouth retail orders that require a dispatch (and thus result in longer completion times). By contrast, for order completion times for the UNE-P, the SQM's standard is all BellSouth retail orders, regardless of whether the retail order required a dispatch (thereby resulting in shorter completion times). BellSouth's SQM is available at https://pmap.bellsouth.com.

As the National Association of Regulatory Utility Commissioners ("NARUC") observed, such state actions must be upheld so long as they are consistent with applicable Commission pricing methodology and enhance Congress's goal of promoting competitive entry, because the 1996 Act manifests an "explicit Congressional intent to preserve State authority to adopt pro-competitive regulations, even where the Commission has not done so." NARUC at 3 & n.4. Similarly, various state commissions explained that "the states should continue to have a significant role in developing policies to facilitate local exchange competition and for preserving the competitive framework initiated by the states, consistent with the 1996 Act and subsequent court decisions." New Jersey Bd. of Pub. Utils. at 11; *see also id*. at 12; Pennsylvania Pub. Util. Comm'n at 2; Minnesota Pub. Utils. Comm'n at 2; Arizona Corp. Comm'n at 3. *Accord* Loop-Transport Coalition at 165 (arguing that "the states retain coexistent and equal roles in the development of local competition").

The 1996 Act strikes a balance between federal and state regulation, creating a regime of "cooperative federalism." *See Michigan Bell Tel. Co.* v. *MCIMetro Access Transmission Servs., Inc.,* 323 F.3d 348, 351-52, 360 (6th Cir. 2003); *Puerto Rico Tel. Co.* v. *Telecommunications Regulatory Bd*., 189 F.3d 1, 8 (1st Cir. 1999). The Bells utterly fail to address the statutory balance struck by Congress, and insist that once the Commission makes a decision concerning unbundling, the Act forbids states to impose additional unbundling requirements under state law. *E.g.,* SBC at 114-15. This assertion is clearly wrong. Although the 1996 Act establishes certain unbundling requirements that set a "floor below which . . . [a state] may not go," states can adopt additional pro-competitive requirements under state law that go beyond the minimum federal requirements. *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753, 812 (8th Cir. 1997) (subsequent history omitted). The Act contains no less than *four* express anti-preemption state-law savings clauses

that make this explicit. *See* 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(b) & (c). *See also CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993) (savings clauses are "the best evidence of Congress' pre-emptive intent"); AT&T at 190-93. Critically, neither the 1996 Act nor any federal regulation *forbids* the states from imposing unbundling requirements as a matter of *state* law. Instead, through its savings clauses, the 1996 Act preserves the states' authority to go beyond the federal minimum and impose additional pro-competitive requirements under state law. Thus, the Bells' central contention – that, *as a matter of law*, the 1996 Act prohibits states from determining that an ILEC must, under state law, provide its competitors with unbundled access to UNEs – is plainly wrong.

Put differently, the Bells' argument reflects their presumption that the Commission has *exclusive* authority to regulate local telecommunications and that the states lack *any* regulatory authority absent a lawful delegation of federal authority. This presumption is untenable. The 1996 Act makes clear that even where the FCC either omits or declines to require the unbundling of a specific network element *nationally*, a state commission has authority to decide whether a carrier must provide unbundled access to network elements, under state law. Accordingly, the question of whether the 1996 Act preempts a state law-based unbundling requirement simply cannot be decided as a matter of law but instead requires a case-specific inquiry addressing the particular regulations at issue and local market conditions.

Relying on *USTA II*, the Bells claim that the 1996 Act forbids state-law regulation that is "inconsistent" with federal regulations, and that any state-law unbundling obligation imposed in the absence of a federal law unbundling requirement is necessarily inconsistent with the federal regulations and thus preempted. Verizon at 117; SBC at 114-15. But the Supreme Court has held that state regulations are "consistent" with federal law so long as it is "possible to comply

with the state law without triggering federal enforcement action." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540 (1977) (emphasis added). If a state commission were to attempt to relieve an incumbent from unbundling an element that the Commission had ordered unbundled, there would clearly be a conflict with federal law and the state commission would be preempted. *See* Sprint at 64. But where state commissions simply impose unbundling obligations that go beyond the federal "floor" established by the Commission, there is no conflict and thus no inevitable preemption. *See* AT&T at 187-88. In such cases, the additional state obligations are not presumptively inconsistent with federal law because incumbents can comply with both state and federal requirements. Instead, as both the *Triennial Review Order* and *USTA II* make clear, a case-specific inquiry is required.

The Bells miss this point because they misread *USTA II*. On appeal from the *Triennial Review Order*, certain states argued to the D.C. Circuit that the *Order* "improperly preempts state unbundling regulations that exist independent of the Commission's federal unbundling regulations enacted pursuant to § 251." *USTA II*, 359 F.3d at 594. In response, the Court of Appeals explained that the *Triennial Review Order* simply established a procedure that allowed parties to petition the Commission for a declaratory ruling that a particular state unbundling decision was preempted, reflecting the Commission's view that its regulations would preempt in some circumstances but not in others. *Id.* Thus, the Court necessarily concluded that whether the FCC's unbundling regulations preempted state unbundling rules could not be decided as a matter of law. Because the Commission had "not taken any view of any attempted state unbundling order," the Court held that the preemptive scope of the *Triennial Review Order* as applied was not ripe. *Id.* Accordingly, both the *Triennial Review Order* and *USTA II* confirm

that whether the questions as to whether a state commission unbundling requirement is preempted must be decided on a case-by-case basis.

The Bells rely on *USTA II*'s determination that the Commission lacked authority to delegate *federal* unbundling decisions to the states to support their argument that the states lack authority to impose unbundling requirements under *state* law. *See* Verizon at 116-17; SBC at 116-17. But the question whether the states can implement federal law is wholly distinct from the question whether the 1996 Act preserves the states' authority to act under state law, as the D.C. Circuit expressly recognized. *USTA II*, 359 F.3d at 568. Indeed, the court rejected the Commission's argument that *Diamond Int'l Corp.* v. *FCC*, 627 F.2d 489 (D.C. Cir. 1980), and *New York Tel. Co.* v. *FCC*, 631 F.2d 1059 (2d Cir. 1980), supported its authority to delegate federal authority specifically because those cases dealt with the "wholly unrelated issue" of preemption, not with the scope of an agency's authority to sub-delegate federal power. *USTA II*, 359 F.3d at 568. The fact that the FCC may not delegate federal power to make unbundling determinations has no relevance to the "scope of federal authority to preempt state authority" under the 1996 Act. *Id*.[69]

Although they deny it, *see* SBC at 115 n.340, the Bells are in fact seeking full field preemption, *see* Qwest at 96, 97 (referring to "this comprehensive federal regulatory regime").

[69] The Bells also misconstrue *Ind. Bell Tel. Co.* v. *McCarty*, 362 F.3d 378, 395 (7th Cir. 2004), in which the Seventh Circuit stated that it could not "imagine" circumstances in which a state could in fact order additional unbundling requirements. The Seventh Circuit nonetheless recognized that such an exercise of state authority was legally permissible, and for that reason, it affirmed a remand to the state commission to reconsider the additional unbundling requirements. *See id*. Further, that decision recognized that states have "independent authority preserved under the Act" and can invoke it to "continue to regulate locally" by imposing pro-competitive requirements. *Id.* at 392.

Indeed, Verizon claims (at 117) there is "an affirmative requirement of federal law" that the Commission make a finding of impairment before *any* element can be unbundled – a result that would be lawful only if Congress had preempted the field. The Commission has previously declined to interpret the Act as preempting the field, *Triennial Review Order* ¶ 192, and it should do so again. The claim of field preemption arises from the Bells' fundamental misunderstanding of the federal-state relationship established by the 1996 Act. Where the states rely on their independent state law authority, they may lawfully consider and decide whether to impose unbundling requirements, and those specific state-law unbundling requirements must be examined on a case-by-case basis to determine whether they are preempted as "inconsistent" with federal regulations.

Implicitly acknowledging that a case-by-case analysis of state-law unbundling requirements is necessary, the Bells also request an expedited procedure by which the Commission can review such requirements; and in such proceedings, Verizon and SBC request that the Commission shift the burden of justifying state-law unbundling requirements onto the state commissions. SBC at 115; Verizon at 119-20. These proposals are baseless. First, there is no warrant for expedition. The Bells have not – and could not – show a likelihood of success on *all* claims that state-law unbundling requirements are preempted; nor have they shown that all or even any particular state-law unbundling requirement is causing irreparable harm. The harm the Bells allege is, in all events, economic which, by definition, is not irreparable.

At bottom, the Bells' position here is that, in every single instance in which a state commission is alleged to have imposed an unbundling requirement inconsistent with the Act, the dispute is always – and automatically – significant enough to require accelerated resolution by the Commission. That plainly will not be true even in most cases, and the Commission should

not in these circumstances issue regulations that will bind it in the future to resolve all such disputes, regardless of the facts and any impact on the market, in a 90-day period. Indeed, the Commission's "rocket docket" recognizes that § 208 complaints should be placed on an accelerated procedural track only after the Staff carefully reviews the facts of the particular disputes and determines that it meets specified factors which help indicate that the dispute is appropriate for such prompt resolution. *See* 47 C.F.R. §§ 1.730(b)-(e). There is no basis to adopt the categorical rule sought by the Bells.

Nor have the Bells justified shifting the burden of persuasion to the states. When federal law enters an area previously regulated by the States, there is a strong presumption against preemption. *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). The Bells' proposed procedure, *i.e.*, placing the burden of demonstrating the need for state-law regulation on the sates, would turn that presumption on its head. Moreover, the Act's savings clauses – clauses which expressly preserve state authority, *see* AT&T at 187-96 – strongly suggest that the burden of demonstrating inconsistency with federal law should not fall on the states, which are simply continuing to play their traditional role, but instead on the Bells.

VIII. THE STATES HAVE AUTHORITY UNDER SECTION 271 TO SET RATES FOR CHECKLIST ITEMS AND TO PROHIBIT BELLS FROM ENGAGING IN ANTICOMPETITIVE PRACTICES LIKE RIPPING APART EXISTING COMBINATIONS.

The Bells' attempts to explain why the Commission has exclusive ratesetting authority over the largely intrastate services the Bells are obligated to provide pursuant to the § 271 competitive checklist are incoherent. They principally rely on the undisputed point that the Commission has exclusive authority over whether to approve or deny a Bell's § 271 application (and once approved, to enforce the conditions of the approval). Verizon at 120-21; SBC at 116-17. But a state commission that merely sets prices and terms for the § 271 checklist items does

not even purport to grant, deny, or enforce a Bell's § 271 application. The Commission's exclusive authority over the merits of a § 271 application does not broadly or automatically pre-empt state commissions from setting terms and conditions for checklist items based on any other federal or state authority they possess. *See* AT&T at 175-78. Indeed, the Commission's sole interest under § 271 is to ensure that the terms and conditions for the checklist items, as implemented in state commission-approved interconnection agreements, meet minimum federal standards so that the Bell's local markets are open to competition. *See* AT&T at 175-76; Comments of AT&T Corp. (filed in WC Docket No. 04-245, July 30, 2004) ("AT&T 271 Pricing Comments").[70]

Contrary to the Bells' claims, the Act and the Commission's § 271 decisions provide that state commissions, and not the Commission, are entrusted in the first instance with setting the prices and terms for the § 271 checklist items. *See* AT&T at 177-80; AT&T 271 Pricing Comments at 12-18. Sections 271(c)(1)(A) and 271(c)(2)(A) provide that the Commission examines a Bell's compliance with the § 271 checklist items by reviewing "binding agreements that have been approved under section 252" by state commissions. Because the Commission did

[70] The obligations under § 271 to provide checklist items as a condition of in-region interLATA authority may be ones that exist under federal law, *see* Verizon at 120, but that hardly means that the Commission is exclusively entrusted with the authority not only to approve a § 271 application but, more broadly, to administer the § 271 checklist obligations. States commonly apply federal law, and that is particularly so under the cooperative federalism regime that the Act embraces. Further, the fact that the MFJ court previously had authority to permit Bell entry into long distance markets (*see id.* at 121 n.133) only reinforces that state commissions would logically set rates for § 271 checklist items today. The MFJ court (like the Commission here) exclusively evaluated whether conditions in local markets had sufficiently changed to justify removing the decree's line of business restrictions. But the MFJ court *never* purported to set the rates and terms for local services; that was always the role of the state commissions.

not set rates or terms in reviewing § 271 applications,[71] the "binding agreements" required by § 271 must plainly contain rates and terms for checklist items that are set by state commissions. *See Sprint Communications Co.* v. *FCC*, 274 F.3d 549, 552 (D.C. Cir. 2001) (competitive checklist requirements are "enforced by state regulatory commissions pursuant to § 252").[72]

The Bells have no serious answer to the fact that § 271 itself provides that states will ordinarily set in the first instance the terms and conditions for § 271 checklist items. They feebly claim that § 271 merely cross-references §§ 251 and 252, and that "to the extent those sections . . . grant authority to state commissions, they are expressly tied to network elements that must be provided as UNEs under § 251" and cannot encompass terms and conditions for § 271 checklist items. BellSouth at 79-80; SBC at 117; Verizon at 122-24. But this fundamentally misconstrues the nature of interconnection agreements. To be sure, state commissions are obligated to ensure that interconnection agreements meet the minimum requirements of the unbundling regulations set forth by the Commission, *see* § 252(e)(2)(b), but interconnection agreements do not merely parrot the Commission's unbundling regulations. Rather, these lengthy and complex documents comprehensively set forth all of the terms and conditions for interconnection, network elements, and services, and also can include a wide number of additional items deemed appropriate, such

[71] *E.g.*, *AT&T Corp.* v. *FCC*, 220 F.3d 607, 615 (D.C. Cir. 2000) ("The FCC does not conduct de novo review of state pricing determinations in section 271 proceedings, nor does it adjust rates"); *California 271 Order* ¶ 41 ("we perform our section 271 analysis based on the rates before us")

[72] The Bells' claim (*e.g.*, BellSouth at 80 n.279; SBC at 116) that the Commission has asserted authority over the entire "section 271 process" is patently misleading. The decision they cite for this proposition stands for the unremarkable holding that only the Commission, and not states, can modify LATA boundaries. *US West LATA Order* ¶ 16-18. As with the decision to allow Bell entry into interLATA markets, *see supra*, the decision to modify LATAs rested with the MFJ court and was transferred to the Commission. The states never had authority to modify LATAs. *Id.* ¶ 18.

as "requirements of state law" that a state commission might impose (§ 252(e)(3)) or, where a Bell has sought interLATA authority, the "terms and conditions under which the [Bell] is providing access and interconnection to its network" for purposes of the competitive checklist (§ 271(c)(1)(A)).[73] Thus, the Bells have provided no support for their claim that the terms and conditions of § 271 checklist obligations will not be implemented in the first instance through interconnection agreements arbitrated by state commissions.

For these very same reasons, there is no merit to the Bells' contention that the states (or this Commission) may not forbid them from ripping apart existing combinations of the § 271 checklist items. *E.g.,* Qwest at 98-99. The Commission previously determined that its rules on combinations of UNEs (47 C.F.R. § 51.315) unbundled pursuant to § 251 were not necessarily incorporated into § 271. The court in *USTA II* deferred to this reading, but stated that the "independent unbundling under § 271 is presumably governed by the *general* nondiscrimination requirement of § 202." *USTA II*, 359 F.3d at 589-90. That holding is undoubtedly correct (because the Bells are common carriers which must offer all services on nondiscriminatory

[73] *See also, e.g.*, *Coserv Ltd. Liab. Corp.* v. *Southwestern Bell Tel. Co.*, 350 F.3d 482, 487-88 (5th Cir. 2003) (even if issues are voluntarily negotiated and are not required as a subject of an interconnection agreement pursuant to § 251, these "other issues" can be "link[ed] . . . together under the § 252 framework"). The Bells' only response to the *Coserv* decision is to claim that it is "wrong" and in conflict with another decision by the Eleventh Circuit. Verizon at 124 n.135 (citing *MCI Telecomms. Corp* v. *BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002)). Verizon claims the decision is wrong because it "rests on the improbable assumption that Congress delegated federal authority to state agencies" to decide "non-§ 251" issues without providing any guiding standard. But that is simply incorrect. Even if § 251 does not apply, state commissions must decide open issues included by the parties using state law or other provisions of the Act, such as section 201-202 or 271. Further, there is no conflict with *MCI* v. *BellSouth*, which was cited and relied on in *Coserv* (350 F.3d at 488 n.15). The court in *MCI* v. *BellSouth* held in dicta that an incumbent was not compelled by § 251(c)(1) to negotiate "any issue" raised by a new entrant, but it simply did not address the full scope of issues that can be included in an interconnection agreement because it held that, with respect to the particular arbitrated issue before it, the state commission was permitted under §§ 251(c)(1) and 252(c)(4) to arbitrate it.

terms), and § 202 plainly empowers the Commission or state commissions (operating pursuant to § 202 or related state law provisions) to bar the Bells from ripping apart existing combinations of § 271 checklist items. As the Supreme Court found in *Iowa Utilities Board*, incumbents engage in an "anticompetitive practice" by "disconnecting previously connected elements" over the objection of competitive carriers. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 395 (1999). Given the Supreme Court's finding that ripping apart pre-existing combinations is anticompetitive and *per se* unlawful, there is no conceivable basis under which the Bells could avoid a finding that this practice violates the § 202 prohibition against "unreasonable discrimination." Accordingly, both the Commission and state commissions (in their role as implementers of the terms and rates for § 271 checklist items) are justified in requiring the Bells to provide checklist items in combinations.[74]

IX. THE INCUMBENTS' TRANSITION PLANS AND PROPOSALS TO EVISCERATE CONTRACTUAL CHANGE OF LAW PROVISIONS SERVE ONLY THEIR PRIVATE INTERESTS, NOT THE PUBLIC INTEREST.

AT&T's opening comments showed that the Commission has ample authority – which it has repeatedly exercised in similar situations – to adopt a multi-year transition plan in the event that it revises the unbundling obligations that it previously adopted. *See* AT&T at 205-07. Most fundamentally, such a plan needs to ensure that consumers served via UNEs who are no longer subject to federal unbundling pursuant to § 251 can be moved to other arrangements without

[74] Qwest attempts to claim that, in some prior Commission decisions, the Commission has found that market forces provide a better mechanism for addressing discrimination prohibited by § 202 than Commission regulation. Qwest at 98-99. But the decisions cited by Qwest arose in the highly competitive wireless and paging markets, and the wholesale market for § 271 checklist items is not remotely akin to these markets. Further, in the cases cited by Qwest, the carriers had legitimate reasons why the allegedly discriminatory practices in fact helped consumers. Here, by contrast, the Supreme Court has agreed with the Commission that incumbents seek to rip apart (continued . . .)

service disruptions. In addition to protecting consumers' interests, the Commission's transition plan should ensure that competitive carriers have enough time to adjust their business models. As AT&T pointed out, in prior instances the Commission has recognized that carriers – both new entrants and incumbents – often require a gradual transition that avoids "dramatic" changes that would be "disruptive to business operations." *Id.* at 207; *see Access Charge Reform Order* ¶ 46 (refusing to reduce incumbents' access charge rates by imposing a "flash cut").

The incumbents, ignoring both these precedents and the needs of consumers, argue for transition arrangements that are designed to end existing arrangements "immediately" and to increase incumbents' profits and serve their private interests. Verizon at 128-30; SBC at 118-21; Qwest at 89-92; BellSouth at 81-83. The Commission should reject these plans. The Bells' claims are premised on the incorrect view that it is "unlawful" and "unconscionable" for the Commission to adopt a plan that provides for unbundling, even during a transition period, if there is no finding of impairment. SBC at 120; BellSouth at 83. But, in addition to the Commission's general authority to develop transition rules, *see* AT&T at 205, *USTA II* recognized that the "at a minimum" clause in § 251(d)(2) permits the Commission to make unbundling decisions on grounds other than impairment, including administrability. A transitional rule that provides for unbundling to avoid harm to consumers and disruption to carriers can be justified on these same grounds.[75]

(. . . continued)
existing combinations "not for any productive reason, but just to impose wasteful reconnection costs on new entrants." *Iowa Utils. Bd.*, 525 U.S. at 395.

[75] The two cases cited by SBC for the claim that the courts of appeals have vacated transitional regimes are simply inapposite. SBC at 120 (citing *Environmental Def. Fund* v. *EPA*, 167 F.3d 641 (D.C. Cir. 1999) ("*EDF*") and *NRDC, Inc.* v. *Reilly*, 976 F.2d 36 (D.C. Cir. 1992)). *EDF* actually supports AT&T's view, because the court there invalidated a regulation that purported to
(continued . . .)

The incumbents assert that consumers served by competitive carriers via UNEs need no transition plan because the Commission's unbundling rules have never been upheld and because competitive carriers and their customers should have known all along that the incumbents' self-described "ceaseless legal challenge" would be successful. *See* SBC at 119; Verizon at 130; BellSouth at 83. That Verizon and SBC make these claims is especially hollow, because these carriers proposed to cure the admittedly anticompetitive harms caused by their mergers with other large LECs by pledging to make UNEs available while they challenged the Commission's unbundling rules. *See* AT&T at 182-87 (explaining that the intended purpose of the merger conditions was to provide the necessary certainty to induce local entry). More generally, there is simply no merit to the incumbents' hysterical claims that any transition plan lasting more than a few weeks is "ruinous" (BellSouth at 83) and will "continue to undermine facilities-based competition" (Verizon at 130). The incumbents will suffer no material harm and will not be deterred from making investments by the Commission's determination that consumers served via any de-listed UNEs should be moved to new arrangements on an orderly basis.

The Bells' claims that the Commission cannot adopt any transitional plan that lasts beyond a few weeks is even more problematic given their efforts to eviscerate the change of law provisions in their interconnection agreements. Verizon at 131-36; SBC at 121-23. According

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(. . . continued)
exempt funding projects from statutory requirements "forever," and it distinguished a prior case where a rule was sustained as a "transition measure" that was necessary to avoid "impos[ing] a substantial and unforeseen burden" on projects that had been initiated under pre-existing requirements. *EDF*, 167 F.3d at 412. And in *NRDC*, the agency issued stays of its own regulation for nine years, even though the statute established "very specific deadlines" for action and permitted the agency to issue, "under carefully defined circumstances," a one-time stay "not to exceed three months." *NRDC*, 976 F.2d at 40. Section 251(d)(2), by contrast, does not so narrowly circumscribe the Commission's authority, as *USTA II* recognized.

to Verizon and SBC, the Commission should adopt a variety of proposals designed to prevent competitive carriers from invoking these contractual provisions, on the view that any elements de-listed by the Commission must be deleted from interconnection agreements in "days," SBC at 123, despite the change of law provisions of the agreements. As AT&T explained, the Commission cannot adopt such proposals. AT&T at 196-203.

As an initial matter, contrary to the Bells' claims, these change of law provisions were quite plainly drafted and negotiated by incumbents with the intent and understanding that they would apply in exactly the circumstances that the they now seek to avoid. In AT&T's experience, the change of law provisions in current interconnection agreements were generally proposed by the incumbents, voluntarily agreed-to by the parties, and were not arbitrated. The incumbents proposed and agreed to change of law provisions both before and after the Triennial Review and other proceedings were instituted, and throughout the periods in which they maintained their self-described "ceaseless legal challenge" to the unbundling rules. Thus, these change of law provisions are generally contained in interconnection agreements because the incumbents wanted to rely on them to be able to seek modification of the agreements if their legal challenges were successful. In these circumstances, the incumbents can offer no compelling reason why the change of law provisions are not perfectly adequate vehicles for addressing any of their interests or why the Commission must take the extraordinary – and indeed, unlawful – step of retroactively changing these bargained-for contractual provisions.

In addition to their requests that the Commission should simply "negate" these change of law provisions (Verizon at 134), the incumbents claim that the Commission should adopt a regulation that it is "bad faith not to agree within 30 days to an amendment deleting from agreements items that no longer must be unbundled under the Commission's rules." SBC at 122.

This suggestion, based on the mistaken view that such amendments are "exceedingly simple," is nonsense. Even if the Commission's new regulations on remand were to de-list certain network elements, a competitive carrier can have a multitude of compelling arguments why there would be no "change of law" as defined by the agreement and, therefore, no basis to amend the interconnection agreement. For example, the particular change in law provision may be particularly narrow, such that it would not be triggered by a non-final Commission order declining to unbundle a particular element. Further, there may be no change of law because the incumbent is obligated to provide the network element pursuant to other obligations. These obligations could include, for example, the Bells' obligations to provide § 271 checklist items, obligations imposed as a result of state or federal merger conditions, or unbundling obligations established under state law that are preserved under the Act. It can by no means be deemed bad faith for a competitive carrier to raise such arguments where appropriate and seek to negotiate and, if necessary, arbitrate these issues before state commissions.

SBC's additional proposal for the Commission to require a state commission to rule on incumbents' requests to "update their interconnection agreements" within 30 days is also misplaced. SBC at 123. Once again, it can obviously take much longer for 30 days for a state commission to consider any conflicting arguments regarding whether a particular change in law provision has been triggered. In the absence of any language in the agreement itself or any procedural rules adopted by the state commission, a state commission can decide disputes about change of law provision using the "broad discretion" that an agency ordinarily has "to control the disposition of its caseload." *USTA II*, 359 F.3d at 588; *see also GTE Serv. Corp.* v. *FCC*, 782

F.2d 263, 273-74 (D.C. Cir. 1986); *Cellular Mobile Sys. of Pa., Inc.* v. *FCC*, 782 F.2d 182, 197 (D.C. Cir. 1985)).

The Commission should refuse to harm consumers by adopting any of the incumbents' proposals for transition plans or for negating contractual change of law provisions. As set forth in AT&T's comments, the Commission should adopt a multi-year transition plan for any network elements that it decides to de-list. Such a plan would include, at a minimum, provisions that allow competitive carriers access to network elements so that existing contracts with customers can be "grandfathered" and that consumers can be assured of transferring their service without service disruptions.

CONCLUSION

The Commission should adopt revised unbundling rules consistent with the foregoing and AT&T's opening comments.

Respectfully submitted,

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October 19, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2004, I caused true and correct copies of the forgoing Comments of AT&T to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: October 19, 2004
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/s/ Peter M. Andros

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